Supreme Court, U.S.
FILED
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92-343

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM; 1992

JAMES BURKE SANTOS, Petitioner

V.

MEGUMI LINDSTROM AND UNIFICATION CHURCH OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

JAMES B. SANTOS
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DENVER, COLORADO 80204
TELEPHONE.(303) 893-9506

I. QUESTIONS PRESENTED FOR REVIEW

A. The primary issues presented for review is as follows:

Whether the statute of limitations for actions under the Colorado Auto Accident Reparations Act begins running on the date of the underlying auto accident or on the date the Plaintiff meets the threshold requirements for commencing a tort action under the Act.

B. Whether the $2,500.00 medical expense threshold requirement of Section 10-4-714(1) (e), C.R.S. (1987 Replacement Volume 4A), is properly an "objective" threshold requiring a finding that $2,500.00 or medical expenses have, in fact, been incurred or whether it was intended to be a "verbal" type threshold which would require a determination of the exact date the Plaintiff knew or should have known that

he or she had a prospective "need" for at least $2,500.00 medical services.

C. Whether the Colorado Personal Injury Practice has any relationship with the Statute of Limitations beginning to run on the date the Plaintiff meets the threshold requirements for commencing a tort action.

II. REVIEW OF JUDGMENTS SOUGHT

A. State Supreme Court.

B. State Appeals Court by Judge Silverstein, Pierce and Marquez, J. J., concur.

C. District Court City and County of Denver.

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E. Mastro v. Brodie, 682 P.2d 1162, 1167-68 (Colo. 1984)

F. Flatiron Paving Co. v Great Southwest Fire Insurance Co., 19 Colo. Law. 2530 (Colo. App. October 25, 1990)

G. Dove v. Delgado, 808 P.2d 1270 (Colo. 1991); and

H. Pistora v, Renden, 765 P.2d 1099 (Colo. App. 1988.

V. REFERENCE TO THE OFFICIAL AND UNOFFICIAL OPINIONS

This matter was decided by the State Supreme Court Case No. 91SC716 giving certiorari to the State Appeals Court Case No. 90CA1563. Denver District Court Case No. 90CV5699 State of Colorado.

VI. GROUNDS ON WHICH UNITED STATES SUPREME COURT IS INVOKED

The State Supreme Court's decision denying Plaintiff's Petition for Rehearing was entered on April 13, 1992.

VII. STATUTORY JURISDICTION

Where the statutes are drawn in question on the grounds of it being contradictory and discriminating against Petitioner.

VIII. CONSTITUTIONAL PROVISIONS

Statutes:

Section 10-4-714(1)(e) C.R.S (1987 Replacement Volume 4A)

Section 13-80-101(1)(j) C.R.S (1987 Replacement Volume 6A)

Section 13-80108(1) C.R.S. (1987 Replacement Volume 6A)

Section 13-80-105(1) 6 C.R.S (1983 Supp.)

(Copies attached in Appendix)

IX. STATEMENT OF THE CASE

This is an action to recover for bodily injuries and losses resulting from an automobile accident on July 6, 1986. Following the automobile accident, the Petitioner sought and received medical treatment where a myleogram was taken on September 9, 1988; it was June 13, 1988 that his medical expenses exceeded $2,500.00. On May 24, 1990, Petitioner commenced this action against the Respondents for the damages he incurred. The Defendant immediately moved to dismiss on grounds that the Petitioner's action was barred by the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act. See Section 13-80-101(1)(j), C.R.S (1987 Replacement Volume 6A).

The trial court on July 27, 1990 entered its Order granting

Defendant's Motion to Dismiss finding that the Petitioner's cause of action commenced on the date of the accident which was July 6, 1986 and that the Petitioner failed to file suit within three years of that date as required by the statute of limitations. It is undisputed that the accident occurred on July 6, 1986, and it is further undisputed that the Petitioner did not meet the $2,500.00 medical expense threshold requirement for bodily injury tort action as provided by the Colorado Automobile Accident Reparations Act at Section 10-4-714,(1)(e), C.R.S (1987 Replacement Volume 4A), until June 13, 1988, nor did he meet any of the other threshold criteria of Section 10-4-714, including death, dismemberment, diagnosis or determination of permanent disability, permanent disfigurement of loss of earnings and loss

of earning capacity extended beyond the 52-week period for no-fault compensation pertaining to lost income.

Petitioner contends that a cause of action for a person injured in an automobile accident accrues when that person knows or should know that his injury meets a statutory threshold for commencing suit.

Generally, a cause of action accrues when a person knows or should know, through the exercise of reasonable diligence, that they have suffered a "legal injury," Section 13-80-108(1), C.R.S (Replacement Volume 6A 1987).

Petitioner commenced his action within two years of meeting the statutory threshold. Therefore, his action was timely filed. The trial court dismissed Petitioner's Complaint in spite of Petitioner's argument that the cause

of action did not accrue until he had met the threshold and his argument that the statute of limitations was tolled until he met the statutorily required threshold. One of the findings of fact by the trial court that was relied upon by the Court of Appeals concerned whether or not Petitioner had knowledge of his injury at the time of the accident. The Court of Appeals held that the records supported a conclusion that the Petitioner knew or reasonably should have known of the fact of his injury on the date of his accident as well. The court of appeals declined to comment on the Petitioner's reference to the State Supreme Court's opinion in

Mastro v. Brodie, 682 P.2d 1162, 1167-68 (Colorado 1984)

wherein "injury" was defined to mean "legal injury" was i.e., containing all of the necessary elements to bring a

claim. There is absolutely nothing contained in the record by which the trial court or the Court of Appeals could conclude that the Petitioner knew or should have known of his injury in the sense of a "legal injury" before he reached the "legal" threshold under Section 10-4-714(2)(e).

X. ARGUMENT

A. THE ISSUE OF WHETHER THE STATUTE OF LIMITATIONS APPLICABLE TO CLAIMS FOR RECOVERY OF BODILY INJURY BROUGHT PURSUANT TO THE COLORADO AUTOMOBILE ACCIDENt REPARATIONS ACT BEGINS RUNNING BEFORE THE "THRESHOLD" REQUIREMENTS OF THAT ACT HAVE BEEN MET OR AFTER THe "THRESHOLD" REQUIREMENTS OF THAT ACT HAVE BEEN MET.

Although the appeals court agreed with the trial court's decision that, because there was no statute of limitations issue in Pistora v. Renden, it should not be expanded to hold that the statute of limitations commences to run on the date the threshold is reached. The Pistoras did have to meet the threshold requirements of Section 10-4-714(1)(e) before they could continue with their action. Regardless if there was a

statute of limitations or not, they still had a threshold requirement.

According to Colorado Personal Injury Practice at S.620 P.44 Volume 7 (1989 Miller), "Presumably an automobile accident injury claim against a person with a 'Complying Policy' would not start the statute of limitations running until a 'threshold' injury was known. The author then cites Pistora. Under the appeals court construction of Section 13-80-108(1), the statute of limitations bars any action for personal injury under the Automobile Accident reparations act that is commenced more than three years after the automobile accident, regardless of when the threshold for filing suit.

When the statute of limitations pertaining to actions for recovery for bodily injury under the Colorado Automobile Accident Reparations Act

begins to run is an issue of significant public importance because it affects all persons injured in automobile accidents. Colorado has a unique statutory scheme which sets forth threshold requirements for bringing suits involving automobile accident cases, and absent meeting one or more of these threshold requirements, an injured party is denied access to the courts and denied justice.

The issue presented is one of pure Statutory construction. The Petitioner submits that under Section 13-80-108(1), C.R.S (Replacement Volume 6A 1987), a cause of action accrues when a plaintiff suffers a legal injury, i.e, when the plaintiff may maintain a cause of action. Applying that principal to an automobile accident case means simply that such action accrues when the plaintiff knows, or should have known, that he

meets one of the PIP threshold requirements contained in Section 10-4-714(1), 4A C.R.S (1987). Until a plaintiff reaches that point, he cannot maintain an action. Pistora v. Renden, 765 P.2d 1098 (Colo. App. 1988). In Mastro v. Brodie, 682 P.2d 1162, the State Supreme Court construed the word "injury" to mean "legal injury." The word appeared in a statutory phrase concerning discovery of injury, just as the relevant statute in this case concerns the same subject. Compare Section 13-80-105(1) 6 C.R.S (1983 Supp.) with Section 13-80-108(1) 6A C.R.S (1987). "Courts have long enunciated the principal that without damage there is no cause of action." See Doyle v. Lynn, 37 Colo. App. 214, 547 P.2d 257, 259 (1975). Recently, the Court of Appeals restated the same principal, holding: "Generally, before a statute of

limitations begins to run, there must be some damage which entitle a plaintiff to maintain a cause of action...the procedure to be utilized in determining when a cause of action accrues is to ascertain when litigation could first have been successfully maintained." Flatiron Paving Company v. Great Southwestern Fire Insurance Company, 14 Brf. Trans. Rptr. 1414, 1415 (Colo. App. October 25, 1990).

Although the Court of Appeals in their decision indicated that the case Dove v. Delgado, 808 P.2d 1270 (Colo. 1991), applied to this issue, that opinion is clearly not correct. Contrary to the facts in this case, the plaintiff in Dove was clearly aware that she had compensable injuries at the time of accident and did not, in fact, "dispute that a cause of action accrued January 27, 1987, the date of the accident." 808

P.2d at 1273. Instead, she contended that the applicable statute of limitations was unreasonably short so as to deny their due process, and that it required her to file her action before she had reached maximum medical improvement.

B. THE COURT OF APPEALS DECISION IN THE PRESENT CASE IS IN DIRECT CONFLICT WITH THE PUBLISHED DECISION OF PISTORA V. RENDEN, 765 P.2D 1099 (COLO. APP. 1988).

Pistora v. Renden, 765 P.2d 1099 (Colo. App. 1988) decided a related issue, i.e., whether or not a person has the right to file a bodily injury claim prior to the attainment of $2,500.00 of actual medical expenses. That decision directly conflicts with the Court of Appeals decision in this case. The court in Pistora held that the plaintiff had no right to file such a claim prior to the

plaintiff's incurring $2,500.00 in medical expenses or otherwise achieving a threshold type injury. In doing so, the Pistora court affirmed the trial court's dismissal of the plaintiff's bodily injury claim, on the grounds that the $2500.00 medical expense threshold had not been met, and characterized the plaintiff's action as having been "premature." The court went on to state that the case could be refiled if the damage threshold was exceeded. 765 P.2d at 1090. Since the State Supreme Court determined in Mastro v. Brodie, supra, that statutes of limitations are tolled until all of the essential elements of a claim are established, and the Court of Appeals found in Pistora v. Renden that all elements of bodily injury claims are not established until the threshold requirement of Section 10-4-714(1) are met,

clearly, the rule of Pistora v. Renden, and the rule of this case are in direct conflict.

By enacting PIP thresholds, the General Assembly created a class of cases where legal injury may or may not occur or be known for some time after the automobile accident. The interests of justice are not served by foreclosing access to the courts to the plaintiff's who do not meet the legal condition precedent within the statute of limitations. See State v. Young, 665 P.2d 108, 110 (Colo. 1983); Pistora v. Renden, 765 P.2d at 1090.

Plaintiffs with bodily injury claims must now decide whether they should immediately file their action and thus violate the rule of Pistora v. Renden, which prohibits them from doing so until they have incurred $2,500.00 in

medical expenses, or, on the other hand, comply with the mandate of Pistora v. Renden, but risk the severe prejudice that is likely to occur by allowing the statute of limitations to run pending realization of a threshold injury.

Petitioner contends that the $2500.00 medical expense threshold requirement, for many reasons, should be recognized as an "objective" type threshold, which requires a simple determination of whether $2,500.00 in medical expenses have been incurred, and not a "verbal" type threshold, requiring a complicated and retrospective determination of exactly when a plaintiff knew or should have known that he or she had a prospective "need" for medical services in excess of that amount. The court in Pistora v. Renden, seems to agree with such a rule. Although the plaintiff

argued in Pistora v. Renden that he had the right to maintain his action for bodily injury because his injuries were of "an on-going nature" and he was thus likely to "exceed the $2,500.00 threshold in the foreseeable future," the court of appeals disagreed. Instead, the court ruled that the actual occurrence of medical expenses was controlling and not a prospective need for such, stating that "an action such as this cannot be maintained unless medical expenses exceed a threshold requirement of $2,500.00," 765 P.2d at 1089. The Court of Appeals in the present case declined to adopt the "objective" type threshold, and in its opinion, adopted a position that seems more akin to a "verbal" type threshold. The Court of Appeals adopted a position that the $2,500.00 threshold had no relationship to the knowledge of his

"injury." Obviously, the legislature felt that the $2,500.00 threshold did have a relationship to the injury that a person receives in an automobile accident. This is evidenced by the fact that they created that level of medical expenses as a threshold level for proceeding with third-party claims. It can be assumed that an injured party, through attainment of medical care, begins to recognize the seriousness of his injury and recognize his entitlement to compensation beyond that compensation provided under the first-party benefits portion of the Colorado Automobile Reparations Act, as that care and the cost of that care escalates.

Based upon foregoing arguments, the Petitioner requests this Honorable Court to grant a Writ of

Certiorari to let nothing stand in the way of justice.

Respectfully submitted this 10th day of July, 1992.

By: James B. Santos

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XI. APPENDIX

A. Opinions.

State Appeals Court Opinion by Judge Silverstein, Pierce and Marquez, J. J., concur.

B. Orders.

State Supreme Court Case No. 91SC716 Petition denied on April 13, 1992. Certiorari to Appeals Court.

State Appeals Court Petition denied October 24, 1991, Case No. 90CA1563.

District Court, City and County of Denver, Case No. 90CV5699 dismissed with prejudice.

C. Findings of Fact.

There is absolutely nothing contained in the record by which the trial court or the Court of Appeals could conclude that the Petitioner knew or should have know of his injury in the

sense of a "legal injury" before he reached the "legal" threshold under Section 10-4-714(1)(e).

CONCLUSIONS OF LAW

A. Open brief

B. District Court City and County of Denver

C. State Appeals Court by Judge Silverstein, Pierce and Marquez, J. J., concur

D. State Supreme Court

E. Section 10-4-714(1)(e), C.R.S. (1987 Replacement Volume 4A)

F. Section 13-80-108(1)(j). C.R.S. (Replacement Volume 6A)

G. Section 13-80-108(1), C.R.S. (Replacement Volume 6A 1987)

H. 13-80-105(1) 6 C.R.S. (1983 Supp.)

I. Bond v. Gallen, 469 A.2d 566, 558 (Pa. 1983)

J. Stackhouse v. Schneider, 559 A.2d 306 (D.C. App. 1989)

K. State v. Young, 665 P.2d 108, 110 (Colo. 1983)

L. Mastro v. Brodie, 682 P.2d 1162, 1167-68 (Colo. 1984)

M. Flatiron Paving Co. v. Great Southwest Fire Insurance Co., 19 Colo. Law. 2530 (Colo. App. October 25, 1990).

N. Dove v. Delgado, 808 P.2d 1270 (Colo. 1992) and

O. Pistora v. Renden, 756 P.2d 1099 (Colo. App. 1988).

P. Doyle v. Linn, 37 Colo. App. 214, 547 P.2d 257, 259 (1975)

Copies attached in Appendix

92-343 (2)

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BURKE SANTOS, Petitioner

V.

MEGUMI LINDSTROM AND UNIFICATION CHURCH OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

APPENDIX 1

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COLORADO COURT OF APPEALS
September 26, 1991
No. 90CA1563
NOT SELECTED FOR PUBLICATION

James Santos, Plaintiff-Appellant

v.

Megumi Lindstrom, an Holy Spirit Association, a/k/a Unification Church of Colorado,

Defendants-Appellees.

Appeal from the District Court of the City and County of Denver

Honorable Connie L. Peterson, Judge

No. 90CV5699

Division I JUDGEMENT AFFIRMED

Opinion by JUDGE SILVERSTEIN*

Pierce and Marquez, JJ., concur

The Mellon Law Firm, Joseph J. Mellon, John S.L. Sackett, Mary F. Mellon, Denver, Colorado, for Plaintiff-Appellant

In this negligence action, James Santos, plaintiff, appeals from the judgment dismissing his claims against defendants, Megumi Lindstrom and Holy Spirit Association, a/k/a Unification Church. We affirm.

The complaint filed May 24, 1990, alleged that on July 6, 1986, an automobile negligently driven by Lindstrom and owned by Holy Spirit Association collided with a vehicle plaintiff was driving, causing him personal injuries and property damage. Defendants filed a motion to dismiss, asserting that the action was barred by the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act, §13-80-101(1)(j), C.R.S. (1987 Repl. Vol. 6A) (No-Fault Act).

Plaintiff filed a response opposing the motion, asserting that his cause of action did not accrue until June 13, 1988, the date his medical expenses exceeded the $2,500 threshold provision of the Colorado Auto Accident Reparations Act, §10-4-714(1)(e), C.R.S. (1987 Repl. Vol. 4A). The trial court determined that plaintiff did not dispute, either in the complaint or in the response to defendants' motion, having knowledge of his injury and its cause on the date of the accident. The trial court therefore determined that, pursuant to §13-80-108(1), C.R.S., plaintiff's cause of action accrued on July 6, 1986.

Accordingly, because the complaint was filed more than three years thereafter, the trial court dismissed the action pursuant to Cox v. Jones, 802 p.2d 1125 (Colo. App. 1990) (cert. granted Dec. 24, 1990) and §13-80-101(1)(j), C.R.S. (1987 Repl. Vol. 6A).

I.

Relying on Pistora v. Rendon, 765 P.2d 1089 (Colo. App. 1988), plaintiff contends that the trial court erred in dismissing the action as time-barred because his cause of action did not accrue until June 13, 1988, when his medical expenses reached the $2,500 "threshold" figure set forth in §10-4-714(1)(e), C.R.S. (1987 Repl. Vol. 4A). We disagree.

The General Assembly has declared that a cause of action for personal injury

"shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." Section 13-80-108(1), C.R.S. (1987 Repl. Vol. 6A). Under the construction urged by plaintiff, however, an injured party cannot have knowledge of his "injury" until he knows that his medical expenses have reached the $2,500 threshold, regardless of the time period involved. We decline to hold that the plain and obvious meaning of the term "injury" includes such a condition. See Charnes v. Lobato, 743 P.2d 27 (Colo. 1987).

We find support for this conclusion in the recent opinion of our supreme court in Dove v. Delgado, 808 P.2d 1270 (Colo. 1991).

There, the plaintiff contended that she was unable to file her claim within the requisite limitations period for tort actions because, at the time she was required to file her action, she was unable to assess the extent of her potential future damages. In rejecting this contention, our supreme court held:

> "We fail to see how Dove's uncertainty as to the extent of her damages prevented the filing of her complaint within the limitations period where the fact of injury was known since the date of her accident. The amount of damages is a matter to be determined at trial, and uncertainty as to the proper award of damages is a question for the trier of fact to resolve." (emphasis supplied)

Here, the record supports the conclusion that plaintiff knew or reasonably should have known of the fact of his injury on the date of the accident. Moreover, after his medical expenses reached $2,500 in June 1988, plaintiff still had more than a year in which to bring a timely action. SEE Cox v. Jones, supra. Accordingly, because the action was not commenced until nearly four years after plaintiff knew or reasonably should have known of the fact of his injury, the trial court correctly applied the three-year statute of limitations to bar plaintiff's claims. SEE Dove v. Delgado supra.

With respect to the case relied on by plaintiff, the trial court concluded

that Pistora v. Rendon, supra, was a case narrowly decided on its facts which held that the trial court's dismissal should have been without prejudice. It further concluded that, because there was no statute of limitations issue in Pistora, the decision should not be expanded to hold that the statute of limitations commences to run on the date the threshold is reached. We agree with this conclusion. See Dove v. Delgado, supra.

II.

Plaintiff also contends that the trial court's dismissal should be reversed because the statute of limitations was tolled until his losses exceeded the No-Fault Act of $2,500. Again, we disagree.

"The purpose of a statue of limitations is to promote justice, discourage unnecessary delay, and forestall the prosecution of stale claims." Dove v. Delgado, supra. As the Dove Court stated in upholding the constitutionality of the two-year statute of limitations for tort actions,

> "Indeed, the shorter time period not only compels parties to move their cases through the court system in a more timely manner, but it reduces the possibility that intervening factors will arise to cloud the issues of causation and damages. By forcing parties to use diligence in pursuit of their claims, the two-year limitations period meets the purposes served by the statute of limitations."

Here, under the tolling construction urged by plaintiff, a plaintiff could delay filing his action for any number of years, without limitation, until his medical expenses reached $2,500. We conclude that such a result is contrary to the legislative purposes of discouraging unnecessary delay and forestalling the prosecution of stale claims. Accordingly, we decline to hold that the three-year statute of limitations was tolled until the No-Fault Act threshold was met.

Judgment affirmed.

JUDGE PIERCE and JUDGE MARQUEZ concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90 CV 5699, Courtroom 9

ORDER

JAMES SANTOS,

Plaintiff,

v.

MEGUMI LINDSTROM, et al.,

Defendants

The Court, having reviewed the Defendants' Motion to Dismiss, filed June 29, 1990, the Plaintiff's Response thereto filed July 3, 1990, and the Defendants' Reply filed July 11, 1990, grants Defendants' Motion To Dismiss.

1. An automobile collision occurred between the parties on July 6, 1986.

2. This matter was filed with the Denver District Court May 24, 1990.

3. Defendant has moved for dismissal based on C.R.S. 13-80-101(j) the three-year statute of limitations under the "Colorado Auto Accident Reparations Act."

4. Defendant contends that Plaintiff had knowledge of the nature of his injury and that the injury was caused by the Defendant on the date of the accident. Defendant then contends she is entitled to a dismissal based on the statute of limitations.

5. Plaintiff does not dispute the knowledge of his injury but takes the

position that the statute of limitations did not commence until the threshold requirements of C.R.S. §10-4-714 were met, citing Pistora v. Rendon, 765 P.2d 1099 (Colo. App. 1988) and Miller, Colorado Personal Injury Practice, §6.20 at p.44.

6. The issue, here, is the effect of §10-4-714 on §13-80-101(j), if any, and if Pistora gives us any assistance with this issue.

7. According to Colorado Personal Injury Practice at §6.20, "Presumably an auto accident injury claim against a person with a 'complying policy' would not start the statute of limitations running until a 'threshold' injury was known." The author then cites Pistora.

8. C.R.S. §10-4-714 defines threshold injury as "death, dismemberment, permanent disability, permanent disfigurement or reasonable need for services having a reasonable value in excess of $2,500.00 and a loss of earnings and earning capacity extending beyond a 52-week period." (Emphasis added.)

9. What does Pistora tell us? In Pistora, the plaintiff's case had been pending for quite some time because the subject motion for summary judgement was filed subsequent to plaintiff's filing of their trial data certificate (presumably, 45 days prior to trial). The plaintiffs' trial data certificate stated that medical expenses were less than $2,500.00.

The defendant filed a motion for summary judgment to which the plaintiff did not respond. The trial court granted summary judgment, dismissing the case with prejudice. The plaintiffs then moved the trial court for reconsideration requesting only that the dismissal be without prejudice. The trial court denied the motion for reconsideration and the case remained dismissed with prejudice. The court of appeals reversed the trial court and held that the proper remedy was dismissal without prejudice and then gave a litany of cases in which trial courts were reversed for an overzealous exercise of discretion.

10. In addition to the holding that the proper remedy for failure to meet the threshold amount of $2,500.00 required by §10-4-714 is not dismissal

with prejudice, the opinion of the court of appeals also includes that "an action such as this cannot be maintained unless medical expenses exceed a threshold requirement of $2,500.00." (765 P.2d at 1089.) It is this phrase which causes the discussion.

11. In speculating what Pistora held we could conclude the following: (1) It was a case narrowly decided on the facts which merely held that the trial court should have granted the plaintiff's request to dismiss without prejudice; (2) failure to meet the threshold requirement tolls the statute of limitations (Undoubtedly, this interpretation is problematic.); and (3) the statute of limitations commences to run when the threshold was reached.

12. It is this Court's opinion that Pistora was a case narrowly decided on its facts which held that the trial court should have granted the plaintiff's request to dismiss without prejudice and that Pistora cannot be expanded to hold that the statute of limitations commences to run on the date the threshold is reached. There was no statute of limitations issue in Pistora.

13. The Colorado Legislature has defined when a cause of action accrues. C.R.S. §13-80-108(1) specifically states:

> A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

14. The Plaintiff does not dispute he was aware of his injury and the cause of the injury on the date of the accident. Section 10-4-714 does not require that the Plaintiff accumulate more than $2,500 before the threshold is met. The statute requires that the Plaintiff have a "reasonable need for services having a reasonable value in excess of $2,500."

15. The Plaintiff's cause of action commenced on the date of the accident July 6, 1986. Plaintiff failed to file suit within three years of that date and therefore Plaintiff's Complaint is dismissed with prejudice.

Accordingly, the Defendants' Motion To Dismiss is Granted.

BEST AVAILABLE COPY

THE COURT OF APPEALS OF THE STATE

OF COLORADO

Case Number 90CA1563

ORDER

JAMES SANTOS V MEGUMI LINDSTROM ET AL

Upon considertation of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including November 25, 1991 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the SUPREME

COURT OF APPEALS
STATE OF COLORADO
filed to be a full, true and correct copy
Date 7-28-92
James G. Benway
Clerk of Court of Appeals
Catherine Cunningh
Deputy Clerk

BY THE COURT:

Silverstein, J.

Pierce, J.

Marquez, J.

DATED: October 24th 1991

SEAL

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COUNSEL OF RECORD
Tri. Ct. Judge - Tri. Ct. Clerk
AND
ON 7-28-92
BY
COLORADO COURT OF APPEALS

SUPREME COURT, STATE OF COLORADO

Case No. 91SC716

Certiorari to the Colorado Court of Appeals 90CA1563

Denver District Court 90CV5699

ORDER OF COURT

JAMES SANTOS,

Petitioner,

v.

MEGUMI LINDSTROM, and HOLY SPIRIT ASSOCIATION, a/k/a UNIFICATION CHURCH OF COLORADO,

Respondents

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 13, 1992.

cc:

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Supreme Court
State of Colorado
Certified to be a full, true and correct copy
JUL 28 1992
MAC V. DANFORD
Clerk of the Supreme Court
By: Deputy

Court Seal

§ 10-4-714. Limitation on tort actions

(1) No person for whom direct benefit coverage is required by operation of sections 10-4-705 to 10-4-707, or for whom direct benefits would have been payable but for exercise of a deductible option or but for a waiting period or percentage limitation, shall be allowed to recover against an owner, user, or operator of a motor vehicle, or against any person or organization legally responsible for the acts or omissions of such person, for damages for bodily injury caused by a motor vehicle accident, except in those cases in which there has been caused by a motor vehicle accident:

(a) Death;

(b) Dismemberment;

(c) Permanent disability;

(d) Permanent disfigurement;

(e) Reasonable need for services of the type described in section 10-4-706(1)(b) and (1)(c) having a reasonable value in excess of two thousand five hundred dollars. "Reasonable value" as used in this paragraph (e) means the average cost of specific types of services described in section 10-4-706(1)(b) and (1)(c) in the state of Colorado as determined by the commissioner and published not less than once each year. Notwithstanding the provisions of this paragraph (e), no person shall be allowed to recover against an owner, user, or operator of a motor vehicle used in a ride sharing arrangement, as defined in section 10-4-707.5(2), or against any person or organization legally responsible for the acts

or omissions of such person for damages caused by a motor vehicle accident in which such vehicle was involved, if such vehicle was in use at the time of the accident in a ride sharing arrangement, as defined in section 10-4-707.5(2), based on a reasonable need for services of the type described in section 10-4-706(1)(b) and (1)(c) unless such services have a reasonable value in excess of five thousand dollars.

(f) Loss of earnings and loss of earning capacity extending beyond the fifty-two week period provided in section 10-4-706(1)(d) and not compensated by an applicable complying policy.

(2) Nothing in this part 7 shall be construed to preclude recovery against an alleged tort-feasor of benefits provided or economic loss recoverable in excess of

the minimum coverage required in section 10-4-706(1)(b) to (1)(d).

§ 13-80-101. General limitation of actions - three years

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within three years after the cause of action accrues, and not thereafter:

(a) All contract actions, including personal contracts and actions under the "Uniform Commercial Code", except section 4-6-111, C.R.S., and except as otherwise provided in section 13-80-103.5;

(b) Repealed by Laws 1986, S.B. 153, § 4.

(c) All actions for fraud, misrepresentation, concealment, or deceit except

those in section 13-80-102(1)(j) or section 13-80-103(1)(f) or (1)(g);

(d) All actions for restraint of trade;

(e) Repealed by Laws 1987, H.B. 1263, § 38.

(f) All actions for breach of trust or breach of fiduciary duty;

(g) All claims under the "Uniform Consumer Credit Code", except section 5-5-202(6), C.R.S.;

(h) All actions of replevin or for taking, detaining, or converting goods or chattels, except as otherwise provided in section 13-80-103.5;

(i) All actions under the "Motor Vehicle Financial Responsibility Act", article 7 of title 42, C.R.S.

(j) All actions under the "Colorado Auto Accident Reparations Act", part 7 of article 4 of title 10, C.R.S.

(k) All actions accruing outside this state if the limitation of actions of the place where the cause of action accrued is greater than that of this state;

(l) All actions of debt under section 40-30-102, C.R.S.;

(m) All actions for recovery of erroneous or excessive refunds of any tax under section 39-21-102, C.R.S.

§ 13-80-108. When a cause of action accrues

(1) A cause of action for injury to person, property, reputation, possession, relationship, or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

(2) A cause of action for wrongful death shall be considered to accrue on the date of death.

(3) A cause of action for fraud, misrepresentation, concealment, or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence.

(4) A cause of action for debt, obligation, money owed, or performance shall be considered to accrue on the date such debt, obligation, money owed, or performance becomes due.

(5) A cause of action for balance due on an open account for goods or services shall accrue at the time of the last item of goods or services proved in such account.

(6) A cause of action for breach of any express or implied contract, agreement, warranty, or trust shall be considered to accrue on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.

13-80-105.

(1) Notwithstanding any statutory provision to the contrary, all actions against any land surveyor brought to recover damages resulting from any alleged negligent or defective land survey shall be brought within the time provided in section 13-80-101 after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the negligence or defect which gave rise to such action, and not thereafter, but in no case shall such and action be brought more than ten years after the completion of the survey upon which such action is based.

COURT OF APPEALS, STATE OF COLORADO

Case No. 90-CA-1563

JAMES SANTOS,

Plaintiff-Appellant,

vs.

MEGUMI LINDSTROM, HOLY SPIRIT ASSOCIATION, a/k/a UNIFICATION CHURCH COLORADO,

Defendants-Appellees.

OPENING BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE DISTRICT COURT
CITY AND COUNTY OF DENVER, STATE OF COLORADO
The Honorable Connie L. Petersen
Trial Court Case No. 90-CV-5699

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1. STATEMENT OF THE ISSUE

Whether the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act begins running on the date of the underlying auto accident or on the date the Plaintiff meets the threshold requirements for commencing a tort action under the Act.

II. STATEMENT OF THE CASE

A. THE FACTS.

On or about July 6, 1986, Defendant Megumi Lindstrom negligently rearended an automobile being driven by the Plaintiff, James Santos. (R. 1). The accident caused property damage and personal injuries to Mr. Santos. On June 13, 1988, his medical expenses exceeded $2500.00. (Id.)

B. PROCEEDINGS AND DISPOSITION BELOW.

On May 24, 1990, Santos commenced this action against Lindstrom and her employer/principal, the Unification Church of Colorado. (R. 1). The Defendants moved to dismiss on grounds that the action was barred by the three-year statute of limitations for actions under the Colorado Auto Accident Reparations Act. See SS13-80-101(1)(j), 6A C.R.S. (1987). (R. 4). The Denver District Court, by Judge Connie L. Petersen, granted Defendants' motion and dismissed Santos' Complaint with prejudice. (R. 54). Santos timely filed an appeal. (R. 55).

III. SUMMARY OF THE ARGUMENT

A cause of action for a person injured in an automobile accident accrues when that person knows or should

know that his injury meets a statutory threshold for commencing suit.

Generally, a cause of action accrues when a person knows or *should* know, though the exercise of reasonable diligence, that they have suffered a "legal injury." Section 13-80-108(1), 6A C.R.S. (1987). Plaintiff Santos commenced his action within two years of meeting the statutory threshold. Therefore, his action was timely filed. At the least, it is not clear from the Complaint that the Plaintiff-Appellant could prove no set of facts which would entitle him to maintain a cause of action. Therefore, the judgment of the District Court dismissing this action must be reversed and the cause remanded.

IV. ARGUMENT

A. THE DISTRICT COURT ERRONEOUSLY DISMISSED THIS ACTION AS TIME-BARRED.

This case considers when a cause of action accrues to a person who has been injured in an auto accident. In other cases, the Court has held that a cause of action accrues when litigation could first be successfully maintained. Tucker v. Claimants In Re: Death of Gonzales, 37 Colo. App. 252, 546 P.2d 1271, 1274 (1975), cert. denied, Colo. 1976. Essential to a cause of action are some damages which could be recovered by legal action. Doyle v. Linn, 37 Colo. App. 214, 547 P.2d 257, 259 (1975). These principles were adopted by the Colorado Supreme Court when it construed the word "injury" in the former medical malpractice statute

to mean "legal injury," i.e., all of the essential elements of a claim for medical malpractice. See Mastro v. Brodie, 682 P.2d 1162, 1167-68 (Colo. 1984). These principles were most recently reaffirmed by this Court in Flatiron Paving Co. v. Great Southwest Fire Insurance Co., 19 Colo. Law. 2530 (Colo. App. October 25,1990).

Because a person injured in an auto accident must meet a statutory threshold before commencing suit, the cases cited above compel the conclusion that such cause of action does not accrue until the statutory threshold is met. However, the General Assembly enacted in 1986 a statutory definition of when a cause of action accrues, and that statute has not yet been construed by

the appellate courts. The District Court below held that a cause of action for injuries suffered in an auto accident accrues on the date of the accident under the new statute, §13-80-108 (1) , 6A C.R.S. (1987). The issue presented is the correctness of that ruling.

Section 13-80-108(1) provides as follows:

> A cause of action for injury to person, property, reputation, possession, relationship or status shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence.

The critical issue is the meaning of the word "injury." To find its meaning, this statute must be read with the threshold provisions of the Colorado Auto Accident Reparations Act, which provide in

pertinent part:

> (1) No person for whom direct benefit coverage is required... shall be allowed to recover against an owner, user, or operator of a motor vehicle ... for damages for bodily injury caused by a motor vehicle accident, except in those cases in which there has been caused by a motor vehicle accident:
>
> (a) Death;
> (b) Dismemberment;
> (c) Permanent Disability;
> (d) Permanent Disfigurement;
> (e) Reasonable need for services of a type described in § 10-4-706(1) (b) and (1) (c) {medical and rehabilitation expenses} having a reasonable value in excess of $2,500.00 ....

§10-4-714, 4A C.R.S. (1987). Unless the person injured meets one of the threshold requirements, he cannot maintain an action for damages. Bushnell v. Sapp), 194 Colo. 273, 571 P.2d 1100, 1102 (Colo. 1977); Pistora v. Rendon, 765 P.2d 1089 (Colo. App. 1988).

A three-year statute of limitations

governs actions brought under the Colorado Auto Accident Reparations Act, Section 13-80-101(1)(j) 6A C.R.S. (1987); Cox v. Jones, 19 Colo. Law. 1643 (Colo. App. June 6, 1990), cert. granted, 20 Colo. Law. 406 (Colo. December 24, 1990).[1] Thus, under the District Court's construction of §13-80-108(1), the statute of limitations bars any action for personal injury under the Auto Accident Reparations Act that is commenced more than three years after the auto accident regardless of when the threshold for filing suit is reached.[2]

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[1] The Supreme Court granted certiorari in Cox v. Jones to review the issue presented by this appeal. See 20 Colo. Law. 406. The Court also granted certiorari on the issue of whether the two-year statute of limitations contained in §13-80-102(1)(c), 6A C.R.S. (1987), governs a negligence action arising from an auto accident, instead of the three-year statute of limitations in §13-80-101(1)(j). Since the action in the instant case was filed within two years after threshold requirement was met, but more than three years after the auto accident, which statute of limitations governs this claim will have no effect on the outcome.

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The District Court noted that §10-4-714(1)(e) did not require the accumulation of $2,500.00 in medical bills, but rather required the Plaintiff to have "a reasonable need for services in excess of $2,500.00." (R. 54). Since there were no allegations related to when the Plaintiff knew or reasonably should have known of this need, this point does not provide an independent basis for dismissal.

The history of this statute compels the conclusion that the word "injury" still means "legal injury." The legislature was presumably aware of this definition when it enacted §13-80-108(1). The concern in the statute for knowing the cause of the injury further enforces the concept of knowledge of a "legal injury". See Mastro v. Brodie, supra.

Comparing the use of the word "injury" here with its use in the Governmental Immunity Act further elucidates its meaning. When the Governmental Immunity Act was originally adopted, the word "injury" was defined to mean "death, injury to a person, damage to or loss of property, of whatsoever kind, which would be actionable in tort if inflicted by a private person." Section 24-10-103(2), 10 C.R.S. (1982) (emphasis added). Something is actionable of course, only

when a cause of action can be maintained on it. Thus, the General Assembly initially defined "injury" in the Governmental Immunity Act as legal injury.

In 1986, the same year that §13-80-108(1) was enacted, the General Assembly changed the definition of "injury" in the Governmental Immunity Act. Gone from a new definition was the word "actionable." The reason for this change can be gleaned from revisions to the notice requirement in the Governmental Immunity Act. Section 24-10-109 (1) was revised to read as follows:

> Any person claiming to have suffered an injury by a public entity or by an employee thereof ... shall file a written notice as provided in this section within 180 days after the date of the discovery of the injury, regardless of <u>whether the person</u>

> then knew all of the elements of a claim or of a cause of action for such injury....

(emphasis added). The General Assembly clearly intended to use the word "injury" there to mean less than a legal injury. Its intention was made perfectly clear. If the General Assembly intended to alter the meaning of that word for statute of limitations purposes, it would have used the same explicitness as in the Governmental Immunity Act.[3]

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[3] The notice requirements in the Governmental Immunity Act serve different purposes than a statute of limitations. They allow a public entity to make a timely investigation of any alleged injuries, permit quick resolution of meritorious claims and permit government to correct dangerous conditions expeditiously claims and permit government to correct dangerous conditions expeditiously. The special reasons for the notice requirement in the Governmental Immunity Act could be frustrated by allowing persons to wait until all of the legal prerequisites of

Therefore, under the proper construction of § 13-80-108(1), the statute of limitations for a person who has been injured in an auto accident begins to run when he knew or with reasonable diligence should have known that he met one of the threshold conditions to bring the action. Under the Complaint in this case, that date was June 13, 1988. Since the action was filed within two years of that date, the Plaintiff's claim is not subject to dismissal on statute of limitations grounds. The judgment of the District Court to the contrary should be reversed and the matter remanded for further proceedings.

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suit existed before such notice was given.

B. THE STATUTE OF LIMITATIONS SHOULD BE TOLLED UNTIL THE PLAINTIFF KNOWS OR SHOULD KNOW THAT HE MEETS THE LEGAL THRESHOLD FOR FILING SUIT.

Several other jurisdictions have passed on the question presented by this appeal. There is a split of authority among them. Several of those decisions are part of the Trial Court record. (R.pp. 20-51). Each decision rests, of course, on particular statutory provisions and precedents within that jurisdiction. However, the rationale of certain cases are in greater accord than others with principles of Colorado law.

In Bond v. Gallen, 469 A.2d 556, 558 (Pa. 1983), the Supreme Court of Pennsylvania held that a tort action allowed by that state's No Fault Act does not begin to run until the Claimant

knows or, exercising reasonable diligence, should know that the Claimant's medical and/or dental losses exceed the statutory threshold. Accord, Stackhouse v. Schneider, 559 A.2d 306 (D.C. App. 1989).The Court noted the similarity between this rule and the "discovery rule", a long standing exception to tort statutes of limitation. Id. at 558-59. Colorado, like Pennsylvania, recognizes the discovery rule. See Mastro v. Brodie, supra.

Tolling the statute of limitations until a Plaintiff knows or should know that he will attain a statutory threshold to commence suit conforms to the concept of "legal injury." See Horan v. Brown, 148 Mich. App. 464, 384 N.W.2d 805 (1986) (per curiam). The

Horan Court concluded that the statutory prerequisite under Michigan's No Fault Act is an essential element of a claim, without which the Plaintiff cannot proceed. Id. at 806; See also, Mielke v. Waterman, 145 Mich. App. 22, 377 N.W.2d 328 (Mich. App. 1985); But see Gagliardi v. Flack, 180 Mich. App. 62, 446 N.W.2d 858 (Mich. App. 1989). The decisions in Horan and Mielke conform with the long standing Colorado rule that a cause of action accrues when the Plaintiff has suffered "legal injury." See Flat Iron Paving Co. v. Great Southwest Fire Insurance Co., supra.

Perhaps one of the better expressions of this principle appears in a pension rights action from California. In Dillon v. Board of Pension Commissioners, 116 P.2d 37, 39 (Cal.

1941), the California Supreme Court, in an opinion by Justice Traynor, wrote:

> A cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time.... Since, however, action by the {pension} board must precede Court proceedings to obtain a pension, a Claimant who has applied to the board, cannot sue for the pension while the claim is under consideration by the board. It is well recognized that the running of the statute of limitations is suspended during any period in which the Plaintiff is legally prevented from taking action to protect his rights.

(Citations omitted). This sensible rule will protect the rights of those persons injured in automobile accidents in Colorado whose right to sue depends on meeting a threshold under the Colorado Auto Accident Reparations Act.

V. CONCLUSION

WHEREFORE, the Plaintiff-Appellant

respectfully requests that the judgment of the District Court be reversed and this cause remanded to the District Court for further proceedings.

Respectfully submitted,

MELLON, HARRIS & COOKSEY, P.C.

BY: _____

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this _____ day of February, 1991, a true and correct copy of **OPENING BRIEF OF PLAINTIFF-APPELLANT** was placed in the U. S. Mail, postage prepaid and addressed to:

James Bruce
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_____

Joan M. BOND, Appellee,

V.

Charles B. GALLEN, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 24, 1983.

Decided Dec. 30, 1983.

Action was instituted for injuries sustained in an automobile collision. The Court of Common Pleas, Civil Division, Delaware County, No. 79-5619, Joseph T. Labrum, Jr., J., granted defendant's motion for judgment on the pleadings, and plaintiff appealed. The Superior Court, No. 1087, Philadelphia, 1980, 292 Pa.Super. 207, 437 A.2d 7, reversed and remanded and defendant appealed. The Supreme Court, No. 19 E.D. Appeal Dkt. 1982,

McDermott, J., held that two-year statute of limitations on tort actions allowed by No-Fault Act does not begin to run until a claimant knows or, exercising reasonable diligence, should know that his or her medical and/or dental expenses exceed threshold specified in section of the Act.

Affirmed and remanded.

Larsen, J., concurred in result.

Roberts, C.J., and Hutchinson, J., dissented.

1. Automobiles 251.18

Although general rule is that actions for personal injury must be brought within two years from date of the injury, general rule must give way within framework of No-Fault Act. 40 P.S. § 1009.101 et seq.

2. Automobiles 251.14

Under section of No-Fault Act pertaining to tort liability, a party does not have a cause of action unless and until medical expenses exceed $750, and except for those with more substantial medical bills, the Act abolishes right of injured parties to recover in tort. 40 P.S. § 1009.301.

3. Limitation of Actions 95(1)

Two-year statute of limitations on tort actions allowed by the No-Fault Act does not begin to run until a claimant knows or, exercising reasonable diligence, should know that his or her medical and/or dental expenses exceed the threshold specified in section of the Act. 40 P.S. § 1009.301(a).

4. Limitation of Actions 95(1)

Plaintiff's cause of action under NoFault Act did not accrue until plaintiff knew she had medical bills which exceeded $750

threshold. 40 P.S. § 1009.301(a).

Peter P. Liebert, III, David McCormick, Philadelphia, for appellant.

Matthew S. Donaldson, Jr., Media, for appellee.

Paul E. Holl, Lansdale, amicus curiae, for Ins. Fed. of Pa.

Before ROBERTS, C.J., and NIX, LARSEN, FLAHERTY, McDERMOTT HUTCHINSON and ZAPPALA, JJ.

OPINION

McDERMOTT, Justice.

This is yet another case requiring an

interpretation of the No-Fault Act.[1] Here the issue is whether the two-year statute of limitations on tort actions allowed by the Act begins to run prior to the claimant knowing that she exceeded the Act's threshold for bringing tort actions.

The facts of this case are rather simple: On February 3, 1977, the appellee was, in-- jured in a car accident, struck from behind by a car driven by the appellant. On April 12, 1979, more than two years later, appellee filed her complaint. There, she stated that it was not until December 2, 1978, when a test indicated that there was pressure on her lower lumbar spine requiring surgery, that she knew that her medical expenses would exceed $750. Until that time, the appellee's medical

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[1] Pennsylvania No-Fault Act Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. § 1009.101 *et seq.*

expenses totalled only $361. It was not until after December 17, 1978, when the appellee underwent surgery, that her expenses in fact exceeded $750.

In an answer to the complaint, the appellant asserted in new matter that the appellee's claim was barred by the statute of limitations. The appellant's motion for judgment on the pleadings was granted by the trial court. Sitting en banc, the Superior Court, 292 Pa.Super. 207, 437 A.2d 7, reversed and remanded,[2] holding that the statute of limitations does not begin to run until the claimant knows or, using reasonable diligence, should have known that the thresholds of section 301(a) of the No-Fault Act had been reached. The appellants brought this appeal,

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[2] Judge Johnson wrote a dissenting opinion in which then President Judge Cercone joined.

arguing that the statute of limitations begins to run on the date of the accident. We disagree, and we affirm the Superior Court's order.

[1] The general rule is that actions for personal injury must be brought within two years from the date of the injury. 42 Pa-C. S.A. § 5524(2).[3] However, the general rule must give way within the framework of the No-Fault Act, since the Act so drastically changed the circumstances under which a person can sue in tort when injured in an automobile accident.

[2] The starting point is Part III of the Act which sets out when a person injured in an automobile accident may bring a cause of action, and when he may not. Section 301 in pertinent part, provides:

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[3] Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 5524.

§ 1009.301 Tort Liability.

(a) Partial abolition. Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that ...

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of

> diagnostic xray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750) ....

40 P.S. § 1009.301. The clear language of the Act states that a party does not have a cause of action *unless and until* medical expenses exceed $750. Except for those with more substantial medical bills, the Act abolishes "the *right* of those injured parties to recover in tort." *Singer v. Sheppard, 464* Pa. 387, 397, 346 A.2d 897, 902-903 (1975).

In its opinion, the Superior Court specifically overruled one of its own cases, Don*nelly v. DeBourke,* 280 Pa.Super. 486, 421 A.2d 826 (1980). The Superior Court reasoned: To say, as Donnelly did, that the statute of limitations starts to run from the date of the accident, even when none of the No-Fault Act's thresholds has been reached, is to say that

the statute starts to run from a date on which, and even though, the cause of action did not exist. Id., 292 Pa.Super. at 211, 437 A.2d at 9. This Catch-22 should not be allowed to stand.[4]

[3] We hold that the two-year statute of limitations on tort actions allowed by the

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[4] Dramatizing its point, the court hypothesized a dialogue between a trial judge, forced to follow the old rule, and a claimant:

> Suppose the accident was on January 1, 1978, buth the $750 threshold was not reached until February 1, 1980. Judge: "your claim is barred because the statute of limitations started to run on January 1, 1978." Claimant: "But under *Singer* I didn't have any cause of action on January 1, 1978. In fact, I didn't get a cause of action until February 1, 1980. By then, according to you, the statute has already run." Judge: "That's true, and it's too bad. What you should have done is, before the statute had run, file a claim saying that although you had no cause of action, because the $750 threshold hadn't been reached, maybe you would have one, because maybe the threshold would be reached. That way you would have protected yourself."

292 Pa.Super at 211, 437 A.2d at 9.

No-Fault Act does not begin to run until the claimant knows or, exercising reasonable diligence, should know that the claimant's medical and/or dental losses exceed a threshold specified in Section 301(a) of the Act.

[4] This rule is in harmony with the general statutory rule for computing periods of limitation, which states:

> The time within which a matter must be commenced under this chapter shall be computed, except as otherwise provided by subsection (b) or by any other provision of this chapter, *from the time the cause of action accrued,* the criminal offense was committed or the right of appeal arose.,

42 Pa.C.S.A. § 5502(a) (Emphasis supplied.).[5]

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[5] Act of July 9, 1976, P.L. 586, No. 142, § 2, 42 Pa.C.S.A. § 5502.

Here, the cause of action did not accrue under the No-Fault Act until the appellee knew she had medical bills which exceeded the $750 threshold.

Such a "discovery rule" would not be foreign to the law in this area. A long-standing exception to the tort statute of limitations allows a plaintiff to bring an action when the injury sustained was not physically ascertainable at the time it was inflicted. The statute does not begin to run in such a case until the potential plaintiff learns, or by the exercise of reasonable diligence could have learned of the tortious conduct. E.g., *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959). (Where a surgeon left a sponge in a patient's abdomen during an operation, undiscovered for nine years.)

Moreover, to enforce a rigid statute of limitations in this case would run counter to

the intentions of the legislature in passing the No-Fault Act. A contrary holding would force claimants to file precautionary, even spurious complaints in order to protect their legal rights if it would be at all conceivable that their medical expenses might exceed the $750 threshold of section 301(a)(5)(B).[6]

The purpose of the Act was to "establish at reasonable cost to the purchaser of insurance, a Statewide system of prompt and adequate basic loss benefits for motor vehicle accident victims and the survivors of deceased victims." 40 P.S. § 1009.102(b). Curbing litigation in cases with comparatively low medical expenses was one method used in the Act to achieve the overall legislative goal of cheaper automobile insurance. To accept

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[6] This result would also be incompatible with the fact-pleading policy of Pa.R.Civ.Pro. 1019(a).

appellant's position would have the effect of encouraging rather than inhibiting such litigation.

Our holding is wholly consistent with this Court's recent decision in *Murphy v. Prudential Property and Casualty Insurance Company,* -- Pa. --, 469 A.2d 1378 (1983). There, we held that a claim ant seeking to recover the cost of purportedly covered services under section 10 is required to bring suit within two years of the date that the claimant *knew or should have known that medical services rendered were necessitated by the automobile accident*, not within two years of the date of the accident. Here, in the same vein, we hold that the statute does not begin to run until the claimant knows or show know that a threshold under section 301(a) has been reached, in other words, until the claimant has a cognizable cause of action

under the Act.

We are sympathetic to the appellant's argument that the result we reach today may present a difficult situation in a case where the threshold is not reached until many years after an accident, giving a defendant problems of proof.[7] However, this, as the Superior Court noted, will be the rare case and cannot solely advance a holding in favor of a rigid statute of limitations.

Thus, on remand, if it is found that the appellee failed to file this action within two years after she knew or should have known, exercising due diligence, that the thresholds of section 301(a) had been surpassed, the

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[7] We note that the provision in section 106 is not a statute of repose applicable to tort actions allowed by Article III of the No-Fault Act. *See Murphy v. Prudential Property and Casualty Insurance Company, supra*. The promulgation of such a statute would be within the province of the legislature.

action should be held time barred. Otherwise, the litigation should be allowed to proceed.

The order of the Superior Court is affirmed and the case is remanded to the trial court for further proceedings consistent with this opinion.

LARSEN, J., concurs in the result.

ROBERTS, C.J., and HUTCHINSON, J., note their dissent.

Maureen L. DOVE, Plaintiff-Appellant,

v.

Laura L. DELGADO,
Defendant-Appellee.

No. 90SA307.

Supreme Court of Colorado,
En Banc.

April 15, 1991

Plaintiff driver brought suit seeking damages for injuries sustained in collision with defendant's vehicle. This District Court, City and County of Denver, J. Stephen Phillips, J., granted defendant's motion for summary judgment. Plaintiff appealed, and appeal was transferred. The Supreme Court, Vollack, J., held that: (1) two-year statute of limitations for negligence action did not violate due process, equal protection guarantees or state equal justice provision, and (2) defendant was not estopped to raise statute of limitations

as a defense.

Affirmed.

1. Appeal and Error 169

Generally, issues not presented in trial court are deemed waived and cannot be raised on appeal.

2. Constitutional Law 48(1)

Stature is presumed to be constitutional.

3. Constitutional Law 48(3)

Burden is on party attacking statute to establish its unconstitutionality beyond reasonable doubt.

4. Constitutional Law 308

Limitation of Actions 4(2)

Statute of limitations does not violate due process unless time fixed is manifestly so limited as to amount to denial of justice. West's C.R.S.A. Const. Art. 2, § 25; U.S. C.A.

Const.Amends. 5, 14.

5. Constitutional Law 308

Limitation of Actions 4(2)

Two-year statute of limitations for filing negligence action was not so unreasonably short as to deny due process, despite plaintiff's contention that period did not allow her to ascertain extent of her damages from automobile collision. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2, § 25; U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law 213.1(2)

For purpose of analysis of equal protection claim under State Constitution, where legislature enactment impacts on fundamental right or creates suspect classification, state has burden of establishing that statute is necessarily related to compelling

governmental interest. West's C.R.S.A. Const. Art. 2, § 25.

7. Constitutional Law 213.1(2)

In the absence of statutory infringement on fundamental right or creation of suspect class, classes of persons may be treated differently without violating equal protection guarantees if statutory classification has some reasonable basis in fact and bears rational relationship to legitimate state purpose. West's C.R.S.A. Const. Art. 2, § 25, U.S.C.A. Const.Amend. 14.

8. Constitutional Law 213.1(2)

Party challenging statutory classification on equal protection ground bears burden of proving beyond reasonable doubt that statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. West's C.R.S.A. Const. Art.

2, § 25; U.S.C.A. Const.Amend 14.

9. Constitutional Law 213.1(1)

Right to recover damages in tort is not a fundamental right such as would invoke strict-scrutiny test under equal protection analysis. West's C.R.S.A. Const. Art. 2, § 25; U.S.C.A. Const.Amend. 14.

10. Constitutional Law 55

It is within Legislature's domain to amend statutes of limitations to shorten or lengthen time after which certain actions shall be brought.

11. Constitutional Law 249(3)

Limitation of Actions 4(2)

Two-year statute of limitations for negligence actions is reasonably related to legitimate governmental purposes and does not violate equal protection guarantees. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2,

§ 25; U.S.C.A. Const.Amend. 14.

12. Constitutional Law 249(3)

Limitation of Actions 4(2)

Two year statutory limitations for negligence actions does not violate state equal justice provision. West's C.R.S.A. § 13-80-102(1)(a); West's C.R.S.A. Const. Art. 2, § 6.

13. Constitutional Law 209

State equal justice provision merely provides that if right accrues under the law, court must be available to effectuate that right. West's C.R.S.A. Const. Art. 2, § 25.

14. Estoppel 52(6)

Doctrine of estoppel is not favored, and will be applied only when all elements are clearly shown.

15. Estoppel 52.15

In order to apply estoppel, party to be estopped must know the facts; this

party must also intend that her conduct be acted on or must so act that party asserting estoppel has right to believe other party's conduct is so intended; party asserting estoppel must be ignorant of true facts; and party asserting estoppel must rely on other party's conduct to her injury.

16. Limitation of Actions 13

Plaintiff's reliance on settlement discussions with defendant's insurer was an unreasonable justification for failing to file suit within statute of limitations, and therefore defendant was not estopped from raising statute as a defense. West's C.R.S.A. § 13-80-102(1)(a).

Malman & Malman, P.C., Jerome S. Malman, Denver, for plaintiff-appellant.

Creamer and Seaman, P.C., Thomas J. Seaman and Thomas J. Jirak, Denver, for defendant-appellee.

Justice VOLLACK delivered the Opinion of the Court.

The plaintiff, Maureen L. Dove (Dove), appeals the trial court's order granting summary judgment in favor of defendant, Laura L. Delgado (Delgado). We Affirm.

I.

On January 27, 1987, an automobile accident occurred between Dove and Delgado, resulting in injuries to Dove. Soon after the accident, Dove notified Delgado and Delgado's insurer of her injuries and claim.

On March 23, 1989, Dove filed this action in the District Court for the City and County of Denver. In her complaint,

she alleged that Delgado "negligently and carelessly drove a vehicle into an automobile driven by the plaintiff." Dove further claimed that she sustained serious injuries as a direct and proximate result of Delgado's negligence, and that her damages exceeded the threshold amount of $2,500 as required under section 10-4-714(1)(e), 4A C.R.S. (1987), of the Colorado Auto Accident Reparations Act.

Delgado answered, citing the two-year statute of limitations under section 13-80-102(1)(a), 6A C.R.S. (1987), as a bar to Dove's negligence claim. On May 23, 1989, Delgado filed a motion for summary judgment, seeking dismissal of Dove's tort action because more than two years had elapsed between the date of the accident and the filing of the lawsuit in violation of section 13-80-102(1)(a). In

her response to Delgado's motion for summary judgment, Dove argued that section 13-80-102(1)(a) was unconstitutional because it violated due process and equal protection of the laws. Dove further argued that Delgado must be equitably estopped from asserting section 13-80-102(1)(a) as a bar to her cause of action.

The trial court granted the defendant's motion for summary judgment, finding that the case had not been filed within the two-year statute of limitations and that section 13-80-102(1)(a) was not unconstitutional. Dove appealed to the court of appeals, and based on the constitutional issues raised, the appeal was transferred to this court pursuant to sections 13-4-

102(1)(b)[1] and 13-4-110(1)(a),[2] 6A C.R.S. (1987).

II.

[1] On appeal, Dove contends that section 13-80-102(1)(a) violates due process; denies her equal protection under the law and violates article II, section 6, of the Colorado Constitution.

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[1] **13-4-102. Jurisdiction.** (1) Any provision of law to the contrary notwithstanding, the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts,..., except in:

(b) Cases in which the constitutionality of a statute, a municipal charter provision, or an ordinance is in question[.]

[2] **13-4-110. Determination of jurisdiction--transfer of cases.** (1)(a) When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

Dove further argues that Delgado should be equitably estopped from raising the statute of limitations as a defense.[3]

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[3] After the parties had submitted then appellate briefs in the present action, the Colorado Court of Appeals issued an opinion in *Cox v. Jones*, 802 P2d 1124 (Colo.App.1990), on June 7, 1990, in which the court held that the three-year statute of limitations under § 13-80-101(1)(j), 6A C.R.S. (1987), governed the plaintiff's tort action arising from an automobile accident. Section 13-80-101(1)(j) provides that "[a]ll actions under the 'Colorado Auto Accident Reparations Act', part 7 of article 4 of title 10, C.R.S." shall be file within three years after the cause of action accrues.

Following the issuance of the *Cox* opinion, Dove filed a motion requesting permission to file a supplemental brief addressing the applicability of § 13-80-101(1)(j) to her tort action. This court granted the motion on November 2, 1990. Both parties filed supplemental briefs on November 29, 1990. On December 24, 1990, we granted the petition for writ of certiorari in *Cox* to review whether a plaintiff filing a general negligence claim may use the three-year statute of limitations contained in the Colorado Auto Accident Reparations Act, or whether the plaintiff must use the two-year statute of limitations for tort actions contained in § 13-80-102(1)(a).

Generally, issues not presented in the trial court are deemed waived and

[2,3] The principal question for our review is whether section 13-80-102(1)(a) is constitutional. That statute provides that tort actions, including actions for negligence, "shall be commenced within two years after the cause of action accrues, and not thereafter." Moreover, section 13-80-108(1) provides that a cause of action for personal injury "shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." We note at the outset that a

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cannot be raised on appeal. *E.g., Paine, Webber, Jackson & Curtis, Inv. v. Adams,* 718 P.2d 508, 509 (Colo.1986); *Christensen v. Hoover,* 643 P.2d 525, 531 (Colo. 1982); Matthews v. *Tri-County Water Conservancy Dist.,* 200 Colo. 202, 206, 613 P.2d 889, 892 (1980); *City of Aurora v. Aurora Firefighters' Protective Ass'n,* 193 Colo. 437, 441, 566 P.2d 1356, 1358 (1977). Because Dove failed to argue at the trial level the applicability of § 13-80-101(1)(j), we decline to consider that issue on appeal.

statute is presumed to be constitutional, and the burden is on the party attacking the statute to establish is unconstitutionality beyond a reasonable doubt. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984); *People in the Interest of C.M.*, 630 P.2d 593, 594 (Colo.1981).

[4,5] Dove first argues that section 13-80-102(1)(a) is so unreasonably short as to deny due process. U.S. Const. amends V and XIV; Colo. Const. art. II, § 25. The general rule is that a statute of limitations does not violate due process "unless the time fixed by the statute is manifestly so limited as to amount to a denial of justice." *Oberst v. Mays,* 148 Colo. 285, 292, 365 P.2d 902, 905 (1961). "The legislature is the primary judge of whether the time allowed by a statute is

reasonable." *Id.; see also Mishek v. Stanton,* 200 Colo. 514, 518, 616 P.2d 135, 138, (1980). Under the facts presented, we do not find that the two-year limitation for filing a negligence action is so unreasonably short as to amount to a denial of justice.

Dove does not dispute that her cause of action accrued on January 27, 1987, the date of the accident. Essentially, she asserts that she was unable to file her claim within the requisite two-year limitations period for tort actions because she had not, in her words, reached "maximum medical improvement" at the time she was required to file her action and was therefore unable to assess with accuracy at that time the extent of her potential future damages. We consider Dove's argument to be without merit.

Dove does not argue that she was unable to ascertain whether she had sustained *any* damage as a result of the accident. In fact, she asserts in her complaint that she incurred damages in excess of $2,500. We fail to see how Dove's uncertainty as to the extent of her damages prevented the filing of her complaint within the two-year limitations period where the fact of injury was known since the date of her accident. The amount of damages is a matter to be determined at trial, and uncertainty as to the proper award of damages is a question for the trier of fact to resolve. *See Peterson v. Colorado Potato Flake & Mfg. Co.*, 164 Colo. 304, 309-10, 435 P.2d 237, 239 (1967). It is the plaintiff's responsibility to gather sufficient evidence from which the trier of fact can calculate a reasonable award

of damages. Dove's failure to reach "maximum medical improvement" is a damages problem to be resolved at trial and in no way affected her ability to file a complaint within the two-year limitations period when she admittedly knew of her injuries since the date of the accident. We therefore hold that section 13-80-102(1)(a) is not unreasonably short so as to violate due process.

B.

Dove next contends that section 13-80-102(1)(a) violates her right to equal protection of the law. U.S. Const. amend XIV; Colo. Const. art II, § 25. She argues that the applicable statute of limitations was shortened from six years to two years only eight months prior to her accident; therefore, by virtue of the date on which her accident occurred, Dove

became a member of a class of individuals burdened by the shorter limitations period. We find no merit in this constitutional challenge.

[6-8] For the purposes of equal protection analysis in Colorado, where a legislative enactment impacts on a fundamental right or creates a suspect classification, the state has the burden of establishing that the statute is necessarily related to a compelling governmental interest. *Austin v. Litvak*, 682 P.2d 41, 49 (Colo.1984); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1015, (Colo. 1982). In the absence of a statutory infringement on a fundamental right or creation of a suspect class, classes of persons may be treated differently without violating equal protection guarantees if the statutory classification has some

reasonable basis in fact and bears a rational relationship to a legitimate state purpose. The party challenging the statutory classification bears the burden of proving beyond a reasonable doubt that the statutory classification is unreasonable or, if reasonable, is unrelated to any legitimate governmental objective. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168, 174-75, (Colo.1987); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 227 (Colo.1986).

[9] The creation of a suspect class is not involved here, and contrary to Dove's assertions, the right to recover damages in tort is not a fundamental right. *Austin*, 682 P.2d at 49-50. We therefore reject the strict scrutiny test and apply instead the rational basis test.

[10,11] In essence, Dove argues

that it is unconstitutional for the legislature ever to reduce a statute of limitations since such an amendment would create a class of persons who would no longer be affected by the repealed statute. It is, however, clearly within the legislature's domain to amend statutes of limitations to shorten or lengthen the time after which certain actions shall not be brought. *Edelstein v. Carlile,* 33 Colo. 54, 57, 78 P. 680, 681 (1904). Moreover, as previously stated, it is for the legislature to determine whether the time allowed by a statute is reasonable. *Mishek v. Stanton,* 200 Colo. 514, 518, 616 P.2d 135, 138, (1980); *Oberst v. Mays,* 148 Colo. 285, 292, 365, P.2d 902, 905 (1961). The purpose of a statute of limitations is to promote justice, discourage unnecessary delay, and

forestall the prosecution of stale claims. *Colorado State Bd. of Medical Examiners v. Jorgensen,* 198 Colo. 275, 279, 599, P.2d 869, 872 (1979). In our view, the two-year limitations period under section 13-80-102(1)(a) is reasonably related to these legitimate governmental purposes. Indeed, the shorter time period not only compels parties to move their cases through the court system in a more timely manner, but it reduces the possibility that intervening factors will arise to cloud the issues of causation and damages. By forcing parties to use diligence in pursuit of their claims, the two-year limitations period meets the purposes served by statutes of limitations. Dove, in our view, has failed to demonstrate that the two-year period is unreasonable. We therefore find that section 13-80-

102(1)(a) does not violate equal protection guarantees.

C.

[12,13] Dove next contends that section 13-80-102(1)(a) deprives her of access to the courts in violation of article II, section 6, of the Colorado Constitution, which provides that "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character." We hold that section 13-80-102(1)(a) does not violate the equal justice provision. That provision merely provides that if a right does accrue under the law, the courts must be available to effectuate that right. *O'Quinn v. Walt Disney Prods.*, 177 Colo. 190, 195, 493 P.2d 344, 346, (1972); *Goldberg v. Musim,* 162 Colo. 461, 469, 427 P.2d 698, 703 (1967); *Vogts v.*

Guerrette, 142 Colo. 527, 532, 351 P.2d 851, 854 (1960). Dove was not denied access to the courts; rather, she failed to pursue her vested right in a timely manner. We therefore refuse to invalidate the statute on this basis.

D.

Finally, Dove argues that Delgado should be equitably estopped from raising the statute of limitations as a defense. Dove maintains that, while the limitations period was running, Delgado's insurer communicated a desire to settle Dove's claim and that these settlement discussions led Dove to believe that litigation would be unnecessary.

[14,15] The doctrine of estoppel is not favored, *University of Colorado v. Silverman*, 192 Colo. 75, 79, 555 P.2d 1155, 1158 (1976), and will be applied only when all of the elements

constituting an estoppel are clearly shown. *Susman v. Exchange Nat'l Bank,* 117 Colo. 12, 15, 183 P.2d 571, 573 (1947). There are four basic elements to an estoppel; (1) The party to be estopped must know the facts; (2) this party also must intend that her conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must rely on the other party's conduct to her injury. *Department of Health v. Donahue,* 690 P.2d 243, 247 (Colo.1984).

[16] Dove has wholly failed to demonstrate how each of these elements applies in the present case. Moreover, we consider Dove's reliance on settlement

discussions with Delgado's insurer to be an unreasonable justification for failing to file within the requisite period of time. *See Silverman,* 192 Colo. at 79, 555 P.2d at 1158. We therefore reject Dove's contention that Delgado must be estopped from raising the statute of limitations as a defense.

Judgment affirmed.

James P. DOYLE and Florene A. DOYLE
Plaintiffs-Appellants,

v.

Kurt O. LINN, Defendant-Appellee

No. 75-131.

Colorado Court of Appeals,
Div. III

December 18, 1975.

Rehearing Denied January 8, 1976.

Selected for Official Publication.

Landowners brought negligence action against surveyor of their land for damages resulting from removal of their home from property surveyed and subsequently determined to belong to government. The District Court, Jefferson County, Roscoe Pile, J., dismissed action as barred by statutes of limitations, and landowners appealed. The Court of Appeals, Silverstein, C. J., held that statute of limitations did not begin to run until adverse claim of government was determined

to be valid and landowners were found to be trespassers.

Reversed and remanded.

1. **Limitation of Actions 44(1)**

Knowledge of government's hostile claim against landowners' property started running of limitation statute against any claim for relief which landowners might have had against government. C.R.S. '73, 13-80-110.

2. **Negligence 119(1)**

In order to recover on claim based on negligence, plaintiff must prove that he suffered damage as proximate result of negligence of defendant.

3. **Negligence 103**

Without damage there is no cause of action on claim based on negligence.

4. **Limitation of Actions 44(2)**

Mere assertion of claim of adverse title does not in and of itself constitute damage for purposes of initiating running of statute of limitations. C.R.S. '73, 13-80-110.

5. **Limitation of Actions 43**

Before statute of limitations begins to run there must be some damage which would entitle plaintiff to maintain cause of action. C.R.S. '73, 13-80-110.

6. **Limitation of Actions 65(2)**

Statute of limitations did not begin to run against negligence action brought by landowners against surveyor of their land until adverse claim of government on land improperly surveyed and believed to belong to landowners was determined to be valid and landowners were found to be trespassers. C.R.S. '73, 13-80-110.

Richeson & McCain, Robert C. McCain, Denver, for plaintiffs-appellants.

Albert B. Dawkins, Denver, for defendant-appellee.

SILVERSTEIN, Chief Judge.

James and Florence Doyle sought recovery of damages resulting from an allegedly negligent survey made by defendant, Kurt O. Linn. Following a trial to the court, it found that the defendant was negligent and that plaintiffs had been substantially damaged as a result of such negligence. However, the court dismissed the action on the ground that the action was barred by the operation of two statutes of limitations, §§ 13-80-110 and 13-80-127, C.R.S. 1973, and plaintiffs appeal that dismissal. Appellee has confessed that § 13-80-127, 1973, is inapplicable

because the claim for relief arose prior to June 1, 1969, the effective date of that statute. Colo. Sess. Laws 1969, ch. 221, 87-1-28, at 697. See Greene v. Green Acres Construction Co., Colo. App., 543 P.2d 108 (announced September 23, 1975). Therefore the sole issue before this court is whether the action was barred by § 13-80-110, C.R.S. 1973. We hold that it was not and reverse the judgment.

In 1960 the Doyles engaged Linn to prepare a boundary survey of a parcel of mountain property that they were considering buying. Linn knew that the Doyles had selected a site for a home they proposed to build and would buy the property if the site was actually within the plot's boundaries. In September 1960 Linn surveyed and staked the boundaries, and delivered a certified plat to the

Doyles. According to this survey, the desired homesite was within the boundaries of the plot. In reliance on the survey, the Doyles bought the land and began building their house in November 1960. The house was not completed until 1970.

The land adjacent to the Doyle plot on the north is owned by the United States, being part of the Pike National Forest. In 1964 government agents began negotiating with the Doyles for permission to widen an access road to the National Forest, which road crossed the Doyle land. During the discussions, the agents advised the Doyles that there was a possibility that their house was on government land. In November 1964 Bureau of Land Management (B.L.M.) began a "dependent survey" of the boundary line.

The survey was completed in June 1965, and was officially accepted and approved by the B.L.M. on February 1, 1968. According to this survey the Doyle house was on government land.

In October 1968 the United States sued the Doyles in the U.S. District Court for trespass, and obtained a judgment which gave the Doyles 90 days to remove the house. The judgment was affirmed, on appeal, on November 6, 1972. United States v. Doyle, 468 F.2d 633 (10th Cir.). Following this affirmance, the Doyles moved the house onto their own land. The cost of this removal constituted the bulk of the damages sought in the present action, which was commenced on January 21, 1973. All of the above facts are undisputed.

The trial court found that, "plaintiffs suffered $14,721.46 loss and damages, and this loss and damages were proximately caused by defendant's negligence." On disputed evidence the court further found that on completion of the survey in 1965 the government advised the Doyles that their house was, in fact, on government land. The court concluded that the six year statute of limitations, § 13-80-110, C.R.S. 1973, began to run in 1965 the date of the notice to the Doyles of the government's claim.

The Doyles first claim that there is insufficient evidence to support the finding that they were advised of the government's claim in 1965. The record reveals substantial evidence before the trial court to support that finding, and accordingly, it will not be disturbed on review. Thiele v. Colorado, 30 Colo.

App. 491, 495 P.2d 558. However that finding of fact is not dispositive of the legal issue presented here.

Appellants also contend that the six year statute of limitations did not begin to run until the final determination of their litigation with the government in 1972. We agree.

As was stated in Patterson v. Ft. Lyon Canal Co., 36 Colo. 175, 84 P. 807, "[t]he statute of limitations begins to run from the time when the plaintiff's cause of action accrues. . . . This rule is never questioned, but the difficulty lies in determining when the cause of action is to be deemed as having accued".

[1] Although knowledge of the government's hostile claim started the running of the limitations statute

against any claim for relief which the Doyles might have had against the government, see Wood v. Henley, 88 Cal. App. 441, 263 P. 870, we are here concerned only with the question of when the claim for relief against Linn, on negligence, arose.

[2,3] In order to recover on a claim based on negligence, a plaintiff must prove that he suffered damage as a proximate result of the negligence of the defendant. Hoover v. Shott, 68 Colo. 385, 189 P. 848. Without damage there is no cause of action. Roessler v. O'Brien, 119 Colo. 222, 201 P.2d 901.

[4,5] The mere assertion of a claim of adverse title does not in and of itself constitute damage. See Zimmerman v. Hinderlider, 105 Colo. 340, 97 P.2d 443. Before the statute of limitations begins

to run there "[must] be some damage which would entitle plaintiff to maintain a cause of action." Housing Authority v. Leo A. Daly Co., Colo. App., 533 P.2d 937. As was stated in DeCaire v. Public Service Co., 173 Colo. 402, 479 P.2d 964:

> "Injury or damage to the person complaining is an essential element of actionable negligence. The plaintiffs could not have filed their suit predicated solely on defendant's negligent act. There must also be injury or damage. Negligence as used in the statute of limitations means the negligent act or acts which results in and gives rise to the ... claim. In other words, until the claimant has been injured or damaged by the alleged negligence, the statute of limitations does not commence to run."

[6] Here plaintiffs suffered no damages until the adverse claim of the government was determined to be valid and plaintiffs were found to be trespassers, with the consequent damages resulting from their being required to remove their house from government land. The statute of limitations did not begin to run until the judgment became final in 1972.

The judgment of the trial court is reversed and the cause is remanded with direction to enter judgment on favor of plaintiffs for the amount of loss and damages as set forth in the decrees heretofore entered by the trial court.

PIERCE and VanCISE, JJ., concur.

(3)

NO. 92-343

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BURKE SANTOS, Petitioner

V.

MEGUMI LINDSTROM AND UNIFICATION CHURCH OF COLORADO, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

APPENDIX II

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FLATIRON PAVING CO. OF BOULDER, a Colorado corporation, Plaintiff-Appellee,

v.

GREAT SOUTHWEST FIRE INSURANCE COMPANY, an Arizona corporation, Defendant-Appellant.

No. 89CA1152

Colorado Court of Appeals, Div V.

Oct. 25, 1990.

Rehearing Denied Dec. 6, 1990.

Certiorari Denied June 17, 1991.

General contractor which was assigned moving subcontractor's rights under a contractor's liability policy filed action against insurer to recover for property damage caused by moving subcontractor during relocation of state historical monument. The District Court, Boulder County, Morris Sandstead, J., entered summary judgment against insurer, and insurer appealed. The Court of

Appeals, Van Cise, J. held that: (1) action was timely; (2) insurer waived right to receive timely notice of pendency of underlying action when it denied liability on the basis of coverage; and (3) exclusion provisions of policy were ambiguous and thus has to be construed to provide coverage.

Affirmed.

1. Limitation of Actions 46(6)

Insured's assignee's cause of action against contractor's liability insurer for failure to indemnify did not accrue until entry of judgment against insured from whom assignee was unable to collect judgment.

2. Insurance 619

Special statute of limitations applicable to actions against persons engaged in construction of improvements to real property, which

did not specifically refer to movers, did not apply to indemnity action to recover from insurer for contractor who agreed to move state historical monument as part of highway paving project, particularly since moving was not an improvement to real property. West's C.R.S.A. § 13-80-104.

3. **Insurance 559(2)**

Contractor's liability insurer waived its right to assert its lack of timely notice of pendency of underlying action as a defense after it denied liability on the basis of coverage when notified by insured ten days after incident occurred, insured did not assert notice defense until after judgment was entered against its insured and action was instituted by insured's assignee.

4.Insurance 435.24(1)

"Care custody or control" and "collapse hazard" exclusions under contractor's liability policy, which called for exclusions of coverage for property damage resulting from moving contractor's work, were in consistent with policy provisions eliminating exclusion for property damage resulting from work in progress that was warranted to be done in a workmanlike manner, an thus provisions were ambiguous and had be construed in favor of insured.

Hutchinson, Black, Hill & Cook, James M. England, Boulder, for plaintiff-appellee

Walberg, Dagner & Lloyd, P.C., Wendelyn K. Walberg, Englewood, for defendant

appellant.

Opinion by JUDGE VANCISE.*

Defendant, Great Southwest Fire Insurance Company (Southwest), appeals a summary judgment entered against it and in favor of plaintiff, Flatiron Paving Co. of Boulder (Flatiron). We affirm.

In early 1983, Flatiron hired Whitlock House Moving, Inc., (Whitlock) to move a state historical monument as part of Flatiron's highway paving contract with the State. In April, during the final stages of excavating under the base of the monument, it collapsed and had to be rebuilt by Flatiron at a cost of approximately $26,000. At the time of the collapse, Whitlock was the insured in a contractor's liability policy with Southwest.

On April 28, Whitlock notified Southwest that the monument had been damaged. On May 2, Southwest wrote Whitlock, acknowledging it had received notice of the loss, and stating that Southwest "will not be able to help you with this claim" on the basis that:

> "This insurance does not apply ... to property damage to ... property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control... ."

On October 4, Flatiron furnished Southwest with the rebuilding costs and advised it would sue if not reimbursed within ten days. A similar letter was sent to Whitlock on the 19th with a copy to Southwest. On November 10, Flatiron filed its complaint against Whitlock.

In November 1984, a default judgment was entered in favor of Flatiron against Whitlock in the amount of $26,365.66, plus interest, costs, and attorney fees. Whitlock then assigned to Flatiron all rights under its liability policy, in exchange for Flatiron's agreement not to execute against Whitlock on its judgment. About eleven months later, Flatiron informed Southwest of the judgment and of assignment of Whitlock's claims. In December 1985, Southwest wrote Flatiron, denying policy coverage and referring to the policy exclusion for damage to property in the insured's "care, custody or control."

On May 14, 1987, Flatiron commenced this action seeking recovery from Southwest for the property damage caused by Whitlock. Its claims were based on (1)

Whitlock's assignment of its rights under the policy (including the right to recover from Southwest for the alleged breach of its contractual obligation to indemnify its insured), (2) Flatiron's status as an intended third-party beneficiary of the insurance contract, and (3) Southwest's allegedly negligent misrepresentations to Flatiron concerning the nature of Whitlock's coverage.

Prior to trial, the court denied Southwest's motion for summary judgment in which Southwest asserted that Flatiron's first two claims were barred by applicable statutes of limitations. The court granted Flatiron's motion for summary judgment on its first two claims on the grounds (1) that Southwest was bound by the prior judgment obtained by Flatiron against its insured, Whitlock,

following Southwest's refusal to defend and (2) that Southwest's policy provided coverage for the factual claims underlying that judgment as a matter of law.

On Flatiron's motion, the third claim was dismissed, with leave to be reinstated in the event of remand after appeal. Judgment was then entered in Flatiron's favor on the first two claims. This appeal followed.

[1] Southwest initially contends that Flatiron failed to file its claims within the three-year period specified in § 13-80-107, C.R.S. (revised and recodified at § 13-80-101(1)(a), C.R.S. (1987 Repl.Vol. 6A)) and that, therefore, the claims should be dismissed. Flatiron asserts that the action is governed by the provisions of the six-year statute, § 13-80-110,

C.R.S.; cf. § 13-80-103.5, C.R.S. (1987 Repl.Vol. 6A), and was, therefore, filed in time. We conclude the claim was timely filed.

Generally, before a statute of limitations begins to run, there must be some damage which would entitle a plaintiff to maintain a cause of action. *Doyle v. Linn,* 37 Colo. pp. 214, 547 P.2d 257 (1975). The procedure to be utilized in determining when a use of action accrues is to ascertain when litigation could first have been successfully maintained. *Tucker v. Claimants in re Death of Gonzales,* 37 Colo.App. 252, 546 .2d 1271 (1975).

Here, Flatiron proceeded against Southest as assignee of its insured, seeking to recover damages for Southwest's breach of its contractual obligation to indemnify Whitlock for

property damage cause by Whitlock.

cause by Whitlock. Although at the time Flatiron brought suit against Whitlock, Whitlock might have sued Southwest for its failure to defend, that claim is not involved here. Under the statute in existence at the time, Whitlock would have had no basis for suing Southwest for failure to indemnify until Whitlock had incurred damages.

The judgment against Whitlock is dated November 19, 1984. It was not until then that the insured or its assignee could have brought a failure to indemnify action against Southwest. As third-party beneficiary, Flatiron had not sustained any damages until it had obtained a judgment against Whitlock from whom it was unable to collect.

Flatiron's action against Southwest was commenced May 14, 1987, well within the three-year period following the

accrual of its claims. Therefore, whether the threeyear or a longer period statute applies, this action was not time barred.

[2] Nelson, Haley, Patterson & Quirk, v. *Garney Cos.*, 781 P.2d 153 (Colo.App. .1989), is inapposite. In that case, this Court construed the special statute of limitation applicable only to actions against certain classes of persons listed in the statute who are engaged in construction of improvements to real property. Colo.Sess Laws 1979,ch 144, § 13-80-127 at 631 (now codified, with additional amendments, as § 13-80-104, C.R.S. (1987 Repl.Vol. 6A)). It does not specifically refer to movers. Furthermore, Whitlock's efforts in moving the monument would not constitute an improvement to real property. *See Stanske v. Wazee Electric Co.*, 722 P.2d 402 (Colo. 1986); *Calvaresi v. National*

Development Co., 772 P.2d 640 (Colo.App.1988); *Black's Law Dictionary* 682 (5th ed.1979).

II.

Southwest also contends that it did not receive timely notice of the pendency of the underlying action and that, therefore, it should have been allowed to litigate Whitlock's negligence and the reasonableness of the damages claimed. We disagree.

[3] Southwest was notified by Whitlock ten days after the collapse, and four days later denied coverage. Before the action was filed by Flatiron against Whitlock, Southwest was advised that, absent reimbursement, a lawsuit would be filed. Relying on its interpretation of the policy, it did nothing. Therefore, as stated in *Colard v. American Family Mutual Insurance Co.*, 709 P.2d 11

(Colo.App.1985), Southwest "waived its right to assert failure to timely forward suit papers as a defense because it denied liability on the basis of coverage only and did not assert the notice defense until judgment was entered against its insured and this ... action was instituted."

In denying coverage under the policy, Southwest took the risk that its interpretation of the policy could be erroneous and that it would ultimately be found liable under the policy. Absent fraud or collusion, by refusing coverage, Southwest waived its right to contest the liability of Whitlock with respect to the matters on which it was sued and the amount of Flatiron's damages.

[4] Southwest further contends that coverage for the damage to the monument is excluded by the "care, custody, or

control" or the "collapse hazard" exclusions stated in the policy. Flatiron argues that this exclusion does not apply if, as here, the work was in progress and there was a warranty that the work would be done in a workmanlike manner. We agree with Flatiron.

The policy provides in pertinent part: "This insurance does not apply:

"(a) to liability assumed by the insured under any contract or agreement, except

an incidental contract; but with respect to bodily injury or property damage occurring while work performed by the named insured is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner; ...

"(k) to property damage to ...

"(3) property in the care,

custody or control of the insured, or as to which the insured is for any purpose exercising physical control;...

"(r) to property damage included within:

"(2) the collapse hazard in connection with the operation identified in this policy by a classification code number which includes the symbol c. . . . "

Inasmuch as the contract between Flatiron and Whitlock specified that Whitlock would perform work for Flatiron in a "proper, efficient, and workmanlike manner," it is undisputed that Whitlock extended a warranty of workmanlike performance.

The above-quoted policy provision (a), applicable here, eliminates the exclusion for property damage resulting

from Whitlock's work in progress that was warranted to be done in a workmanlike manner. However, provisions (k)(3), and (r)(2) pertaining to "care, custody or control" and the "Collapse hazard," equally applicable here, call for exclusions of coverage. Therefore, the exclusion provisions are ambiguous. *See Colard v. American Family Mutual Insurance Co., supra; Worsham Construction Co. v. Reliance Insurance Co.*, 687 P.2d 988 (Colo.App.1984). And, any ambiguity in the exclusionary clauses of an insurance contract must be construed in favor of the insured. *Colard v. American Family Mutual Insurance Co., supra.*

So construed, the policy affords coverage for work product damage caused by Whitlock's negligent workmanship.

Judgment affirmed.

CRISWELL and REED, JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988) Repl.Vol. 10B).

Edward R. MASTRO, M.D., Petitioner

v.

Barbara Jean BRODIE, Respondent

No. 81SC305.

Supreme Court of Colorado
En Blanc

May 7, 1984.

Rehearing Denied May 29, 1984.

Medical malpractice action was brought. The District Court, Pueblo County, Thomas F. Phelps J., rendered summary judgment in favor of physician on ground that action was time barred, and patient appealed. The Court of Appeals, Pierce, J., 638 P.2d 800, reversed and remanded for trial. On certiorari to the Court of Appeals, the Supreme Court, Neighbors, J., held that: (1) statute of limitations in medical malpractice claim based on lack of informed consent begins to run when claimant has knowledge of facts which would put a reasonable person on notice of nature

and extent of injury and that the injury was caused by the wrongful conduct of another, an (2) material issue of fact was raised whether, during period from July 1977 to July 1979, patient should have discovered that either physician had been negligent in performing surgery or that he had failed to advise her before surgery that a keloid scar would develop and that she was a member of a high-risk class, or whether patient discovered her injury when she visited a specialist during month of August 1979, when she was advised of her high-risk status for keloid scarring, thereby precluding summary judgment on statute of limitations grounds.

Affirmed

Rovira, J., dissented and filed opinion, in which Erickson, C.J., joined.

1. Limitation of Actions 95(1)

Medical malpractice claimant must file action within two years after he or she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury," with the repose provision prescribing filing of action more than three years after act or omission which gave rise to the claim. C.R.S. 13-80-105(1).

2. Limitation of Actions 95(1), 104(1)

Knowing-concealment and foreign-object exceptions apply only to three-year statute of repose and not to two-year statute of limitations for medical malpractice action. C.R.S. 13-80-105(1), (1)(a).

3. Limitation of Actions 104(1)

Knowing-concealment exception to three-year statute of repose was inapplicable in medical malpractice

action brought by patient against physician. C.R.S. 13-80-105(1), (1)(a).

4. Physicians and Surgeons 18.15

Since patient filed suit against physician within three years from date of act or omission, her medical malpractice claim was not barred by three-year statute of repose. C.R.S. 13-80-105(1).

5. Statutes 181(2)

Courts should not adopt a construction of a statute which may encourage the filing of frivolous claims.

6. Limitation of Actions 95(1)

Under legal-injury standard, the "act or omission" is the equivalent of wrongful conduct and is but one element of the "injury," as that word is used in two-year statute of limitations for medical malpractice action based upon lace of informed consent. C.R.S. 13-80-105(1).

7. Limitation of Actions 95(1)

Two-year statute of limitations for medical malpractice action based upon lack of informed consent begins to run when claimant has knowledge of facts which would put a reasonable person on notice of nature and extent of injury and that injury was caused by the wrongful conduct of another. C.R.S. 13-80-105(1).

8. Judgment 181(7)

In medical malpractice action brought by patient against physician, question of fact was raised whether, during period from July 1977 to July 1979, patient should have discovered that either physician had been negligent in performing surgery or that he had failed to advise her before surgery that a keloid scar could develop and that she was a member of a high-risk class, or whether patient discovered during month

of August 1979, when she was advised of her high-risk status for keloid scarring, thereby precluding summary judgment on statute of limitations grounds. C.R.S. 13-80-105(1).

Johnson, Mahoney & Scott, P.C., Paul E. Scott, Brian J. Lampert, Denver, for petitioner.

Spurgeon, Hanley & Howbert, P.C., Gregory R. Piché, Colorado Springs, for respondent.

NEIGHBORS, Justice.

We granted certiorari to review the decision of the court of appeals in *Brodie v. Mastro*, 638 P.2d 800 (Colo.App.1981), reversing the order of the district court granting summary judgment to petitioner, Dr. Edward R. Mastro (Mastro), in a medical malpractice

action. The court of appeals held that the malpractice claim of respondent, Barbara Jean Brodie (Brodie), was not barred by the applicable statute of limitations. We affirm the judgment of the court of appeals.

I.

We learn the following facts from Brodie's complaint, deposition, and affidavit filed in opposition to the motion for summary judgment.[1] On February 5, 1977, Mastro surgically removed a small nodule from the back of Brodie's shoulder.[2] He obtained Brodie's consent to the surgery after explaining

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[1] We express no opinion as to the truth of these facts. Whether Brodie can prove the facts alleged remains to be determined at trial.

[2] The surgery was performed without incident, and Brodie returned a few days later to have the stitches removed. She makes no claim that Mastro negligently performed the surgery.

that she would have a scar, "but it wouldn't be a bad one." Several months later, however, the scar from the surgery became "large, unsightly and uncomfortable." Brodie returned to Mastro in July 1977, but received no further treatment and no explanation of what had happened. He told her only that "there was nothing else he could do about [the scar]." Since that time, Brodie has had no contact with Mastro. She received treatment, including a series of injections into the scar, from two other physicians during the next two years. She also discussed the scar with at least two attorneys for whom she worked during this time period. Her scar, however, has remained approximately the same in size and appearance as when she first became aware of it. In August 1979, a physician at the University of Colorado Medical

Center informed Brodie that she had developed a "keloid"[3] on her shoulder. Further, he told her that a surgical procedure on the shoulder of young, dark-skinned individuals frequently results in the formation of a keloid, which, while unpredictable, does occur in a percentage of such patients. He indicated to Brodie's attorney that "the risk of keloid should have been anticipated" and that Mastro should have warned Brodie of such a risk before operating on her shoulder.[4]

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[3] *Dorland's Illustrated Medical Dictionary* 695 (26th ed.1981) defines "keloid" as "a sharply elevated, irregularly-shaped, progressively enlarging scar due to the formation of excessive amounts of collagen [fibrous tissue] ... during connective tissue repair."

[4] Brodie is a dark-skinned woman. She described her racial background in her deposition as "half black and half Mexican." Brodie's father had been a patient of Mastro's before her surgery.

Three months later, in November 1979, Brodie filed a complaint against Mastro in the Pueblo County District Court alleging medical malpractice. She claimed that, when she consulted him about the nodule on her shoulder, Mastro knew or should have known of the inherent risk of keloid development in a person with her physical characteristics, and that he knew or should have know that disclosure of this risk "would be of great significance to a person in [Brodie's] position in deciding to submit to surgery." Since Mastro was "under a duty to inform [Brodie] of any substantial or special risks inherent in the procedure," his failure to mention keloid scarring before the surgery prevented her from making "an intelligent choice as to alternative treatments consonant with the underlying premise of

informed consent." As a result, Brodie suffered "a serious, permanent disfiguring injury" in the form of "a large, unsightly growth" that was "plainly visible on her shoulder." While admitting that she was aware of the scar by July 1977, Brodie concluded by alleging that she was not aware and could not reasonably have been aware of "[Mastro's] negligence in failing to inform her" of the high risk of keloid formation until she consulted the physician at the medical center in August 1979, at the direction of her attorney.

After depositions of the parties were taken, Mastro filed a motion for summary judgment, claiming that the two-year statute of limitations for medical malpractice actions based on lack of informed consent barred Brodie's claim. *See* section 13-80-105(1), C.R.S.1973

(1983 Supp.).[5] Under this provision, the two-year period begins to run when the injured person discovers or in the exercise of reasonable diligence should have discovered "the injury." Mastro claimed that there was no genuine issue of material fact since Brodie "has admitted that she knew of the injury (unsightly scar) more than two years prior to initiation of her Complaint."

Brodie filed a memorandum opposing the summary judgment motion. She acknowledged that her "claim in this action is based upon [Mastro's] ... failure to secure her 'informed consent'" before operating on her shoulder. However, she argued that section 13-80-105(1) also contains an exception which, in her view, tolls the two-year statute

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[5] This statute is discussed in more detail in Part II, *infra*.

of limitations if the act or omission giving rise to a cause of action is "knowingly concealed." *See* section 13-80-105(1)(a), C.R.S. 1973 (1983 Supp.).[6] Relying on this provision, Brodie argued that Mastro "knowingly concealed" from her the high risk of keloid formation. She stated in her affidavit that she did not learn of the existence of this risk until August 1979, when she consulted the surgeon in Denver about her scar.

The district court granted the motion for summary judgment. It concluded that the two-year statute of limitations began to run no later than July 1977, when Brodie returned to Mastro's office "to complain about the

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[6] This statute is also discussed in Part II *infra*. If an act or omission giving rise to a cause of action is "knowingly concealed," the injured person must file the action within two years after he or she discovers or should have discovered "the act or omission."

enlarged scar," and expired in July 1979, four months before she filed her complaint. The court explained its decision in terms of when Brodie discovered her "injury":

> "In July, 1977, the scar had achieved such proportions that [she] returned to [see Mastro] because the scar was large, unsightly and uncomfortable. [Brodie] discovered the injury in July, 1977, at the very latest. She was fully aware of it at that point, and its very existence made her cognizant of the risks involved in the February 5, 1977 surgery. She knew that a keloid formation was not only a risk but a reality for shoulder surgery on a young, dark-skinned female."

A divided panel of the Colorado Court of Appeals reversed the judgment of

the district court. The majority conceded that, "[i]f the only allegation here was uninformed consent," the two-year statute of limitations in section 13-80-105(1) would bar Brodie's action.[7] However, since Brodie also alleged knowing concealment against Mastro, the court decided that the exception provided by section 13-80-105(1)(a) might be applicable to Brodie's action. According to the majority, the issue was whether Mastro knowingly concealed from Brodie the high risk of keloid scarring to one

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[7] "If the only allegation here were uninformed consent, we would agree that the portion of the statute is conclusive as it only requires that the patient be aware, or should have become aware of the injury. It is undisputed that her awareness occurred more than two years prior to her filing this lawsuit." *Brodie v. Mastro,* 638 P.2d 800, 801 (Colo.App.1981).

of her skin pigmentation.[8] Since the evidence on this issue was "contradictory," the court concluded that it "should not have been disposed of by summary judgment." *Brodie*, 638 P.2d at 801.[9]

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[8] The majority did not elaborate on how or when Mastro may have engaged in knowing concealment. The principal focus of its opinion was that the failure to warn Brodie about the risk of keloid scarring may have constituted knowing concealment, regardless of when the failure to warn took place.

[9] Judge Coyte, in his dissent, emphasized the distinction between lack of informed consent and knowing concealment:

> "The exception to the statute relied upon by the majority, in my view, has no application to the facts in this case. As I read the statute, an action for lack of informed consent is barred if not brought within the two year period. The exception quoted has application if, *e.g.* the damaged party, the plaintiff in this case, were to question the surgeon as to the results and then he were to conceal the results of the surgery from the patient. This is what I believe the statute referred to when it states: 'If the act or omission which gave

II.

Brodie's claim for medical malpractice is premised on the theory of lack of informed consent prior to the surgery which occurred on February 5, 1977. Her complaint was not filed until November 19, 1979. Mastro pleaded the affirmative defense of the statute of

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rise to the cause of action was knowingly concealed by the person committing such act or omission.'

"The claim for relief here is that Dr. Mastro did not have plaintiff's informed consent to perform the operation. It would be immaterial if the lack of informed consent resulted from 'knowingly concealing' not advising or misadvising. Such action would be barred within the two year period 'after the person bring the action discovered, or in the exercise of reasonable diligence ... should have discovered the injury.'

"Here, plaintiff was fully aware of the results of her surgery in July 1977, when she returned to complain to Dr. Mastro of the results of the surgery. At the time this action was commenced on November 19, 1979, it was barred by § 13-80-105, C.R.S.1973 (1980 Cum.Supp.)."

limitations contained in section 13-80-105, C.R.S.1973 (1983 Supp.). In order to avoid the two-year statute of limitations defense, Brodie relies upon the knowing concealment exception contained in section 13-80-105(1)(a). thus, the first issue to be resolved is whether knowing concealment is an exception to the two-year statute of limitations.

A.

Section 13-80-105(1) establishes a two-year statute of limitations for medical malpractice actions based on lack of informed consent. The statute provides:

> "No person shall be permitted to maintain an action, whether such action sounds in tort or contract, to recover damages from ... any person licensed in this state ... to

practice medicine, ... on account of the alleged negligence, breach of contract, or lack of informed consent of such person in the practice of the profession for which he is licensed ... unless such action is instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury. *In no event may such action be instituted more than three years after the act or omission which gave rise thereto, subject to the following exception:*"

(Emphasis added.) The underlined language creates a three-year statute of repose, subject to statutory and judicial exceptions. *See Austin v. Litvak,* 682 P.2d 41 (Colo.1984). The exception for

knowing concealment in section 13-80-105(1)(a) states:

> "if the act or omission which gave rise to the cause of action was knowingly concealed by the person committing such act or omission, ... then such action may be instituted within two years after the person bringing the action discovered, or in the exercise of reasonable diligence and concern should have discovered, the act or omission, ..."[10]

[1,2] In construing these

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[10] Subsection (a) also contains an exception to the three-year statute of repose where the "act or omission consisted of leaving an unauthorized foreign object in the body of the patient...." The exception provided in subsection(b) applies to actions brought by or on behalf of minors who are under the age of six years on the date of the act or omission. This subsection requires that the case be instituted within two years after the child reaches six years of age.

provisions, we conclude that a medical malpractice claimant must file an action within two years after he or she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the injury." Section 13-80-105(1). In addition to this period of limitation, the repose provision proscribes the filing of an action more than three years after the act of omission which gave rise to the claim. However, section 13-80-105(1)(a) contains two exceptions to the three-year period of repose. First the claim is not barred if the person who committed the act or omission knowingly conceals that fact. Second, the claim is excepted from the period of repose if the physician left an unauthorized foreign object in the claimant's body. Under either exception, however, the medical malpractice action

must be filed within two years after the plaintiff discovers or should have discovered the defendant's act or omission. We are persuaded that the knowing concealment and foreign object exceptions apply onlyto the three-year statute of repose and not to the two-year statute of limitations. *See Sanchez v. South Hoover Hospital,* 18 Cal.3d 93, 132 Cal.Rptr. 657, 553 P.2d 1129 (Cal.1976); *Graham v. Hansen,* 128 Cal.App.3d 965, 180 Cal.Rptr. 604 (1982).

[3,4] In applying this statutory interpretation to the facts of this case, we hold that the knowing concealment exception is inapplicable. Brodie filed suit against Mastro within three years from February 5, 1977, the date of the act or omission. Thus, her claim is not barred by the three-year statute of repose. We conclude that the pivotal

question in this case is whether Brodie filed suit within two years after she "discovered, or in the exercise of reasonable diligence and concern should have discovered, the *injury*." Section 13-80-105(1) (emphasis added). Therefore, we must interpret the word "injury" as it appears in the statute of limitations governing medical malpractice cases.

B.

Section 13-80-105, C.R.S.1973 (1983 Supp.), became effective on July 1, 1977.[11] Before that date, the statute prohibited a person from maintaining a malpractice action sounding in "tort or contract" to be maintained:

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[11] *See* An Act Concerning Limitation of Actions, and relating to the Period During Which a Person May Maintain an Action for Medical Malpractice, Colo.Sess.Laws 1977, ch. 198, 13-80-105(1)(a) at 817.

> "[u]nless such action is instituted within two years after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the seriousness and character of his injuries and the negligence or breach of contract which gave rise to such action. In no event may such action be instituted more than six years after the act or omission which gave rise thereto...."

Section 13-80-105, C.R.S.1973. A separate statute, section 13-80-105.5, C.R.S.1973, established another two-year statute of limitations for malpractice actions based on lack of informed consent. The General Assembly repealed section 13-80-105.5, effective July 1, 1977, and inserted lack of informed

consent in section 13-80-105. It also deleted the words "seriousness and character of his injuries," "negligence," and "breach of contract," substituted the generic word "injury" which had been used in the informed consent provision, and added the words "act or omission." We view this action by the legislature as an effort to combine a number of complex legal concepts into three legal terms.

C.

There are at least three possible interpretations of the word "injury": (1) the alleged negligent act or omission; (2) the physical damage or manifestation resulting from the act or omission; or (3) the legal injury, i.e., all the essential elements of a claim for medical malpractice.

At least two courts have adopted the first definition. *See Landgraff v.*

Wagner, 26 Ariz.App. 49, 546 P.2d 26 (Ariz.App.), *appeal dismissed*, 429 U.S. 806, 97 S.Ct. 40, 50 L.Ed.2d 67 (1976); *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77 (Del. 1979). We reject this interpretation of the word. The legislature clearly intended that the word "injury" have a different meaning than "act or omission" because the three words are each used in the malpractice statute. *See Allen v. Newport*, 427 F.Supp. 42 (M.D.Tenn.1976). A claimant must file suit within two years after discovering the "injury" and, in no event, more than three years after the date of the "act or omission." Moreover, such a construction defeats the purpose of the discovery rule which has been specifically adopted by the legislature.

[5] Likewise, we reject the interpretation that the "injury" occurs

for purposes of the statute of limitations on the date of the injury manifests itself in a physically objective and ascertainable manner. The physical damage test fails to account adequately for all relevant factors. In some cases, such as the discovery of a sponge left in the patient during surgery (*Peralta v. Martinez*, 90 N.M. 391, 564 P.2d 194 (N.M.App.1977), the discovery of the physical injury may occur simultaneously with the discovery of the only possible cause, i.e., the doctor's negligence. However, where the injury is consistent with post-operative recovery and treatment is continued by the treating doctor who reassures the patient that there is no permanent damage, the patient who reasonably trusts the doctor and relies upon the physician's advice would be unfairly barred from bringing

suit. In addition, the physical injury standard requires a claimant to immediately file suit against a physician, even though the plaintiff has no knowledge of any wrongful conduct on the part of the doctor. Courts should not adopt a construction of a statute which may encourage the filing of frivolous claims. In *Foil v. Ballinger*, 601 P.2d 144, 147-48 (Utah 1979), the Utah Supreme Court cogently summarized the rationale for rejecting this interpretation of the word "injury":

> "While the recipient may be aware of a disability of dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician and the injury suffered. Even if there is,

it may be passed off as an unavoidable side effect or a side effect that will pass with time.... [W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right.

"Furthermore, to adopt a construction ... that encourages a person who experiences an injury, dysfunction or ailment, and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged....

"It would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action non-actionable."

[6] The most recent pronouncement by an appellate court involving a statute which employs the words "act or omission" and "injury" is found in *Moore v. Jackson Park Hospital,* 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (Ill.1983). The Illinois statute formulates the discovery rule as the claimant "knew, or through the use of reasonable diligence should have known," Ill.Rev.Stat., ch. 83 ¶ 22.1 (1977). This discovery rule is phrased

in the Colorado statute as "discovered, or in the exercise of reasonable diligence and concern should have discovered...." Section 13-80-105(1), C.R.S.1973 (1983 Supp.) We view this semantic difference as insignificant. The Illinois Supreme Court adhered to its previously adopted legal injury rule and stated:

> "In medical malpractice cases in which the discovery rule is applied the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that it was wrongfully caused.... Logic dictates, that a plaintiff cannot bring a cause of action until he knows or reasonably should know of his injury, and also knows or reasonably should know that

the injury was caused by the wrongful acts of another."

Moore, 69 Ill.Dec. at 226-27, 447 N.E.2d at 411-12. We are persuaded that under the legal injury standard, the "act or omission" is the equivalent of wrongful conduct and is but one element of the "injury," as that word is used in the two-year statute of limitations.

[7] We hold that the statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another. The overwhelming majority of state appellate courts which have addressed the issue here have adopted the "legal injury" construction of the word "injury" used in statutes of limitation governing medical

malpractice actions. The focus is on the plaintiff's knowledge of facts, rather than on discovery of applicable legal theories. Decisions by the appellate courts of California, Hawaii, Iowa, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Utah, and West Virginia support this interpretation of the word "injury."[12]

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[12] *See Graham v. Hansen*, 128 Cal.App.3d 965, 180 Cal.Rptr. 604 (1982) (statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice); *Yamaguchi v. Queen's Medical Ctr.*, 648 P.2d 689 (Hawaii 1982) (cause of action accrues when the plaintiff discovers, or should have discovered, the negligent act, the damage, and the causal connection between the former and latter); *Baines v. Blenderman*, 223 N.W.2d 199 (Iowa 1974) (statute of limitations does not begin to run in a medical malpractice case until the injured person knows or can be charged with knowledge of the existence of his cause of action); *Massey v. Litton*, 669 P.2d 248 (Nev.1983) ("injury" as used in medical malpractice statute of

limitations means legal injury, i.e., all essential elements of malpractice cause of action); *Brown v. Mary Hitchcock Memorial Hosp.*, 117 N.H. 739, 378 A.2d 1138 (1977) (in a medical malpractice case the plaintiff's cause of action does not accrue until he discovers, or should (not could) have discovered, that the injury may have been caused by the defendant's negligent conduct); *Silverman v. Lathrop,* 168 N.J. Super. 333, 403 A.2d 18 (1979) (cause of action accrues not when the plaintiff receives legal advice as to the merits of his claim, but rather when he discovers significant facts which provide the basis for a medical malpractice claim); *Iverson v. Lancaster,* 158 N.W.2d 507 (N.D.1968) (limitations period commences to run against malpractice plaintiff from time act of malpractice with resulting injury is, or by reasonable diligence could be, discovered); *Schiele v. Hobart Corp.*, 284 Or. 483, 587 P.2d 1010 (1978) (statute of limitations for commencing action to recover for injuries to person begins to run on claim for occupational disease allegedly resulting from defendant's negligence when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant played in causing that condition); *Berry v. Branner,* 245 Or. 307, 421 P.2d 996 (1966) (the cause of action for medical malpractice accrued at the time plaintiffs obtained knowledge, or reasonably should have obtained knowledge, of the tort committed upon her person by defendant). *see also Duncan v.*

D.

We turn to the question of whether the trial court properly granted the motion for summary judgment filed by Mastro. The trial court and the court of appeals concluded that Brodie discovered her injury in July of 1977. However, we believe that there are issues of material fact to be resolved at trial.

In *Baines v. Blenderman*, 223 N.W.2d 199 (Iowa 1974), the Iowa Supreme Court held that the discovery rule requires both knowledge by the claimant than an

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Augter, 62 Or.App. 250, 661 P.2d 83 (1983), and *Dortch v. A.H. Robins Co. Inc.*, 59 Or.App. 310, 650 P.2d 1046 (1982); *Foil v. Ballinger*, 601 P.2d 144 (Utah 1979) (the term "discovery of injury" means discovery of the physical injury and the negligence which resulted in the injury); *Renner v. Asli*, 280 S.E.2d 240 (W.Va.1981) (limitations period does not begin to run until the plaintiff has knowledge, or in the exercise of reasonable diligence has reason to know, of the medical malpractice).

injury has occurred and that the injury was caused by the wrongful conduct of the defendant. In *Baines*, the defendant argued that the claimant's perception of physical harm should be equated with imputed knowledge of its origin in malpractice. The court rejected the contention. The court stated that knowledge of an injury may or may not be sufficient to alert a reasonably diligent person to the basis of a claim, depending upon the circumstances of the case. However, in order for the statute of limitations to bar the claim, it is not necessary for the defendant-physician to prove that the claimant knew the specific acts of negligence committed by the defendant or that he knew the details of the evidence which were necessary to prove the claim. It is enough that the claimant knew, or may reasonably be

charged with knowledge of, sufficient facts to be aware that a claim existed more than two years before it was filed.

[8] The court in *Baines* stated that the fact the claimant received assurances from his doctor that nothing was wrong, although a factor to be considered on the issue of reasonable diligence, does not necessarily mean that the plaintiff should have know sooner than he did of the defendant's alleged malpractice. Thus, the court concluded it is a question of fact as to when the plaintiff discovered, or in the exercise of reasonable care should have discovered, that his injuries were caused by the wrongful conduct of the defendant. The court held that in such cases summary judgment is inappropriate. This result is consistent with our decisions in *Owens v. Brochner,* 172 Colo. 525, 474 P.2d 603

(1970), and *Davis v. Bonebrake,* 135 Colo. 506, 313 P.2d 982 (1957), in which we held that whether the statute of limitations bars a particular claim is a fact question. Therefore, only in the clearest of cases may a summary judgment motion be granted where discovery of the injury is the pivotal issue. Here, it is a question of fact whether, during the period from July 1977 to July 1979, Brodie should have discovered that either Mastro had been negligent in performing the surgery or that he had failed to advise her before surgery that a keloid scar could develop and that she was a member of a high risk class, or whether Brodie discovered her injury when she visited the specialist in Denver during the month of August 1979, when she was advised of her high risk status for keloid scarring.

The judgement of the court of appeals is affirmed.

ROVIRA, J., dissents.

ERICKSON, C.J., joins in the dissent.

ROVIRA, Justice, dissenting.

I dissent from Parts II(B), (C), and (D) of the majority opinion. In particular, I disagree with the majority's interpretation of the word "injury" and with the majority's application of that interpretation to the facts of this case. In both instances, the analysis presented by the majority is carefully tailored to achieve a certain result. It also signifies a growing discomfort in close cases with the standard operation of statutes of limitation. I am not unaware of these tensions. At the same time, I prefer a more straightforward approach than that

adopted by the majority in this case.

On its face, section 13-80-105 neither defines the word "injury" nor provides guidance on how to determine when an injury has been discovered. The majority therefore identifies and compares several interpretations before deciding that the "legal injury" interpretation is what the legislature really intended when it enacted the statute. In my view, however, the "legal injury" interpretation ignores the recent legislative history of section 13-80-105. This statute was amended on July 1, 1977.[13] Before that date, persons were prohibited from maintaining malpractice actions based on negligence or breach of

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[1] *See* An Act Concerning Limitation of Actions, and Relating to the Period During Which a Person May Maintain an Action for Medical Malpractice, Colo.Sess.Laws 1977, ch. 198, 13-80-105(1) at 817.

contract

> "unless such action is instituted within two years after the person bringing the action either discovered, or in the exercise of reasonable diligence and concern should have discovered, the seriousness and character of his injuries *and* the negligence or breach of contract which gave rise to such action. In no event may such action be instituted more than five years after the act or omission which gave rise thereto...."

Section 13-80-105, C.R.S.1973 (emphasis added.) A separate statute established another two-year statute of limitations for malpractice actions based on lack of informed consent. It provided:

> "No person shall be permitted to maintain an action for noncompliance

> with [the statute imposing a duty on physicians to provide information sufficient for informed consent] unless such action is instituted within two years after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the *injury* about which the patient was not informed."

Section 13-80-105.5, C.R.S.1973 (1976 Supp.) (emphasis added). Effective July 1, 1977, the General Assembly revised and combined these two statutes. It repealed section 13-80-105.5 and inserted "lack of informed consent" in section 13-80-105. It also deleted the provision in section 13-80-105 calling for discovery of the negligence or breach of contract which gave rise to such action.

These changes convince me that the word "injury," as used in the current statute, does not mean "legal injury." It defies common sense to conclude, as the majority does, at 1167, that even though the legislature deleted the words "and the negligence or breach of contract" from the statute, it simultaneously inserted the concept of legal injury into the single word "injury" that remained in the statute. If the legislature intended the revised statute to include the concept of legal injury, it certainly would have avoided such confusion subterfuge. In the language of the majority, it would have "combine[d] a number of complex legal concepts into [one] legal term," *id.*, and that term would have been "legal injury."

In analyzing the current statute, I do not disagree with the basic premise

that "injury" must mean something more than mere physical damage or manifestation. For example, the injured person may be aware of a physical manifestation but have no understanding of its seriousness; or the injured person may be aware of it seriousness but not associate it with a particular time, place, or person. In either situation, a person discovering the physical manifestation could be barred unfairly by the running of the statute of limitations. In *Gleason v. Guzman,* 623 P.2d 378 (Colo.1981), we invalidated a personal injury release on the grounds that the executor of the release was mistaken about the true nature of the injury suffered. We stated:

> "Knowledge of the nature of an injury requires an awareness and some appreciation of its extent,

> severity and likely duration. *See, e.g.*, ... *Mitzel v. Schatz*, 175 N.W.2d 659 (N.D.1970); *Poti v. New England Road Machinery Co.*, 83 N.H. 232, 140 A. 587 (1928). Admittedly, line-drawing here is difficult and its direction may well vary with the thrust of evidence. These basic components of knowledge, however, relate primarily to a comprehension of the basic character of the injury as distinct from a prediction or opinion about the future course of recovery when its basic nature is otherwise unknown."

Gleason, 623 P.2d at 385.

I would prefer that this court adopt an approach similar to *Gleason* in this case. Our emphasis in *Gleason* on recognizing the seriousness and character of one's injury represents a middle

ground between the view that discovery of the physical injury is enough, *see Allen v. Newport,* 427 F.Supp. 42 (M.D.Tenn.1976), and the view that discovery of the "legal injury" is required. Under this approach, the pivotal question in this case becomes whether Brodie discovered or reasonably should have discovered the "seriousness and character" of her injury more than two years before she filed her complaint.

As a general rule, the trier of fact should decide whether the statute of limitations bars a particular claim. *Owens v. Brochner,* 172 Colo. 525, 474 P.2d 603 (1970); *Davis v. Bonebrake,* 135 Colo. 506, 313 P.2d 982 (1957). However, the trial court in this case decided that summary judgment was appropriate, since the evidence, when viewed in the light most favorable to Brodie, revealed that

she was "fully aware" of her injury by July 1977. The court of appeals agreed; in its view, the evidence was "undisputed" that Brodie discovered her injury more than two years before she filed her complaint. *Brodie V. Mastro,* 638 P.2d 800, 801 (Colo.App.1981). After reviewing Brodie's deposition, I concur with the courts below that she discovered her injury by July 1977.

Brodie originally went to see Mastro in part because both she and her mother thought the nodule might be cancerous. She did not consider the nodule unsightly and would have declined surgery had she known that a large and "ugly" scar would develop on her shoulder. She specifically asked Mastro about scarring because she did not want a bad scar. The scar from the surgery was small and normal-looking when Brodie returned to

have the sutures removed. She did not discuss the surgery at that time because "[t]here was nothing wrong then." During the next several months, both she and her mother noticed that the scar was "growing" and "getting bigger." It itched and became painful. Brodie knew that the scar was "real bad" and did not resemble other scars she had on her own body and other scars she had seen. As she kept track of the scar on her shoulder, she became aware for the first time that scars could become "this big or this unsightly." She returned to Mastro's office in July 1977 specifically to complain about the size and appearance of the scar. It was enlarged, raised, unsightly, uncomfortable, and painful in July 1977. She found it embarrassing and tried to cover it with clothing so that other people would not see it. After

Mastro told her there was nothing more he could do, Brodie sought out and received further treatment, including a series of injections into the scar tissue, from at least two other doctors, neither of whom mentioned keloids or the risk of keloids. She also discussed her scar with at least two attorneys because she remained "unhappy" about what had happened. She waited, however, until the latter part of 1979 to bring her action because she wanted, if possible, to "tr[y] to get it fixed" first. Finally, after the plastic surgeon explained to her the nature of keloids, she brought her action against Mastro because he "misled" her by not warning her about the risk of bad scarring.

Brodie's deposition testimony indicates that she discovered the physical manifestation resulting from the

surgery within several months after the surgery on her shoulder. It also demonstrates that she was fully aware of both the seriousness and character of her injury when she saw Mastro in July 1977. At that point, she had a true appreciation of the extent and severity of her injury and a clear perception of Mastro's role in inducing it. She knew and was upset that Mastro had not warned her about the possibility of bad scarring. The *only* piece of information not in her possession in July 1977 was the knowledge that, as a young, dark-skinned female, she fit into a high-risk category. While this knowledge may have increased her understanding about what happened, she did not need to know *why* the keloid appeared in order to bring an action based on lack of informed consent. She only needed to know that it *did*

appear and that Mastro never warned her about it.

This point can best be illustrated by analogizing Brodie's situation to that of a light-skinned person. If a light-skinned person undergoes surgery and develops a keloid, and if the physician never mentioned the admittedly low risk of keloid scarring in a light-skinned person, that person would have a cause of action based on lack of informed consent. *See Bloskas v. Murray,* 646 P.2d 907 (Colo.1982) (duty to warn turns on significance of the risk to the patient's informed decision to submit to the medical procedure); *Mallet v. Pirkey,* 171 Colo. 271, 466 P.2d 466 (1970) (physician has affirmative duty to warn patient of substantial risks). The complaint would allege that the physician never warned the patient about the risk of bad

scarring. The fact that a light-skinned person fits into a low-risk category would be of no significance to the plaintiff's cause of action. That fact would only be important when the trier of fact decided if the physician's failure to warn was consistent with community standards for this particular risk. *See Bloskas,* 646 P.2d at 914 (duty of disclosure depends upon the extent of information given by reasonably careful physicians in the same or similar community); *Miller v. Van Newkirk,* 628 P.2d 143 (Colo.App.1980) (whether disclosure was adequate depends upon community standards); *Stauffer v. Karabin,* 30 Colo.App. 357, 492 P.2d 862 (1971) (failure to inform must be consistent with community standards);

Colo. J.I. 15:16 (1984 Supp.).[14]

I see no reason to distinguish between a light-skinned person, with a low risk of keloid scarring, and a dark-skinned person, with a high risk of keloid scarring, for purposes of determining when a person discovers his

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2. "Before a physician (treats) (operates on) (or) (performs a procedure on) a patient, he has a duty to secure the informed consent, whether express or implied, from the patient.
For a patient's consent to be an informed consent, a physician must have informed the patient of the following:
1. The nature of the ailment;
2. The nature of the (operation) (procedure) (or) (treatment);
3. The alternative treatments available, if any, and
4. The substantial risks, if any, involved in undergoing the (operation) (procedure) (or) (treatment), and the substantial risks, if any, involved in undergoing any alternative treatments available.
A physician has a duty to inform a patient of the above ... items to the extent a reasonable physician practicing in the same field of practice (as a general practitioner in the same or similar locality) (as a specialist) at the same time would have informed

4.

the patient under the same or similar circumstances."

or her injury. Discovery of injury in an informed consent case should not mean one thing for a low-risk person and another for a high-risk person. Yet, by suggesting that Brodie may not have completed the necessary discovery until she learned of her high risk, the majority appears to have imposed an artificial distinction based on a person's particular level of risk. That level of risk will affect the factual determination at trial of whether the failure to warn was consistent with community standards, It should not, however, affect the outcome of a summary judgment motion based on the running of the two-year statute of limitations. The outcome in this case is dependent upon whether Brodie discovered the seriousness and character of her injury and whether she realized that Mastro never warned her about the possibility of bad scarring.

In my view, she made the necessary discovery in July 1977, more than two years before she filed her complaint.

Accordingly, I dissent.

I am authorized to say that ERICKSON, C.J., joins in this dissent.

Wayne M. PISTORA and Michelle Pistora
Plaintiffs-Appellants,

v.

Crystal D. RENDON,
Defendant-Appellee

No. 87CA1650.

Colorado Court of Appeals, Div. I.

Nov. 25, 1988

Plaintiffs brought suit seeking damages for personal injuries sustained in automobile collision. The District Court, Adams County, Donald W. Marshall, Jr., J., dismissed the suit with prejudice for failure to meet threshold medical expense requirement of the No Fault Act. Plaintiffs appealed. The Court of Appeals, Sternberg, J., held that dismissal without rather than with prejudice was the appropriate penalty, given plaintiffs'

assertion that medical treatment of injuries sustained was ongoing, and thus expenses were likely to exceed the $2,500 threshold in the foreseeable future.

Reversed and remanded with directions.

1. Judgement 185.2(9)

Failure to respond to a motion for summary judgment, in and of itself, cannot serve as the basis for entry of judgment. Rules Civ.Proc., Rule 56.

2. Pretrial Procedure 690

Suit seeking damages for personal injuries sustained in automobile collision should not have been dismissed with prejudice for failure to meet threshold requirement for medical expense of $2,500; dismissal without prejudice was the appropriate penalty in view of plaintiffs' assertion that medical treatment of the injuries was ongoing, and thus expenses were likely

to exceed the $2,500 threshold in the foreseeable future. C.R.S. 10-4-714.

Wilcox & Ogden, Ralph Ogden, Denver for plaintiffs-appellants.

Robert Hibschweiler, Charles T. Trowbridge, Littleton, for defendant-appellee.

STERNBERG, Judge.

Wayne M.and Michelle Pistora appeal the dismissal with prejudice of their suit seeking damages for personal injuries sustained in an automobile collision with the defendant, Crystal D. Rendon. We reverse.

The accident occurred on February 7, 1986, and suit was filed on May 21 of that year. On August 24, 1987, Pistoras' counsel filed a trial data certificate in which the medical expenses were shown to total $1,800. By one provision of the "No Fault"

Motor Vehicle Insurance Act, § 10-4-714, C.R.S.(1987 Repl. Vol. 4A), an action such as this cannot be maintained unless medical expenses exceed a threshold requirement of $2,500. On August 27, Rendon moved for dismissal for failure to meet the threshold medical expense requirement.

The Pistoras did not respond directly to that motion. The trial court treated it "as being under C.R.C.P. 56 and as seeking a final order of judgment" and, on September 21, dismissed the action with prejudice. Two days later, however, the Pistoras moved that the action be dismissed without prejudice for failure to meet the threshold requirement and also filed a separate motion for reconsideration of the September 21 order of dismissal. The trial court denied the motion, and this appeal followed.

(1) In its entry of summary judgment on September 21, the court noted, inter alia, that the Pistoras had not responded to the motion. Failure to respond to a motion for summary judgment, in and of itself, cannot serve as the basis for entry of judgment. Seal v. Hart, 755 P.2d 462 (Colo. App.1988). Thus, the issue presented is whether the trial court abused its discretion in dismissing the suit with, rather than than without, prejudice.

In arguing that the dismissal should be without prejudice, the Pistoras point out that medical treatment of the injuries sustained was of an ongoing nature and, thus, was likely to exceed the $2,500 threshold in the foreseeable future. We note that, had the Pistoras' motion for dismissal without prejudice

for failure to reach the threshold been filed prior to that of the defendants, such motion might properly have been granted under C.R.C.P. 41(a)(1)(B).

A trial court's exercise of discretion is not without bounds. See Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112(Colo. 1986); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995(1963). In determining whether there has been an abuse of discretion, it should be borne in mind that courts exist primarily to afford a forum to settle disputes between parties on the merits. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767(1965).

In Nagy v. District Court, 762 P.2d 158 (Colo.1988), the supreme court held the trial court erred in preventing

plaintiffs from testifying as a sanction for their not having filed a timely trial data certificate. Similarly, in Kwik Way Stores, Inc. v. Caldwell, 745 P.2d 672(Colo.1987), the supreme court held the sanction of a default judgment to be too severe under facts presented for failure to comply with a discovery order. See also Buckmiller v. Safeway Stores, Inc., supra; AAA Crane Service, Inc. v. OmniBank University Hills, 723 P.2d 156 (Colo.App.1986); Group 1 Services, Ltd. v. Michilleti, 650 P.2d 1305 (Colo.App.1982). These cases concerning the appropriate sanctions for procedural violations are instructive here.

(2) We conclude that sealing the courthouse doors to the Pistoras by preventing them from ever litigating the substance of their claims, should the $2,500 medical threshold be exceeded, is too severe a punishment for the premature filing of their action. Hence, the dismissal with prejudice constitutes an abuse of discretion; instead, dismissal without prejudice is the appropriate penalty. With that type of dismissal, should the damages threshold be exceeded, then the case can be refiled and decided on its merits; if not, the case is ended.

The judgment is reversed and the cause is remanded with directions to enter judgment dismissing the action without

prejudice.

PIERCE and REED, JJ., concur.

Murelena STACKHOUSE, Appellant,

v.

Mark M. SCHNEIDER and Ebbitt Green Electronic, Inc., Appelless.

No. 88-163

District of Columbia Court of Appeals.

Argued Feb. 15, 1989
Decided May 26, 1989

Automobile accident victim brought action against driver of second vehicle involved in accident and driver's employer. The Superior Court, District of Columbia, Bruce D. Beaudin, J., dismissed. Victim appealed. The Court of Appeals, Mack, J., held that statute of limitations for bringing action under Compulsory No-Fault Motor Vehicle Insurance Act began to run When victim qualified under one of exceptions to maintain action under Act.

Reversed and remanded.

Limitation of Actions 95(4)

Statute of limitations for maintaining action under Compulsory No-Fault Motor Vehicle Insurance Act begins to run when injured party knows, or exercising reasonable diligence should know, that party qualifies under one of six exceptions in Act, rather than on date of injury. D.C. Code 1981, §§ 12-301(8), 35-2105.

Frederic W. Schwartz, Jr. with whom Robert Cadeaux, Washington, D.C., was on brief, for appellant.

Bruce R. Robertson, Alexandria, Va., for appellees.

Before MACK, NEWMAN and SCHWELB, Associate Judges.

MACK, Associate Judge:

This appeal presents the narrow issue of when the statute of limitations for bringing an action under the Compulsory No-Fault Motor Vehicle Insurance Act of 1982, D.C.Code § 35-2101 et seq. (1985 Supp.) begins to run. All parties agree that the general Code provision would prohibit an action "for which a limitation is not otherwise specifically prescribed" from being brought after three years from the time the right to maintain the action accrues. We reject appellees' contention that the action in this case accrued at the time of injury. We hold that the statute of limitations began to run when the injured party qualified under on of the six exceptions of § 35-2105 to maintain an action under the No-Fault Act.

On June 1, 1984, Mr. Schneider, operating a motor vehicle owned by his employer,

Ebbitt Green Electronics, Inc., allegedly collided with a motor vehicle owned and operated by Ms. Stackhouse. As a result, Ms. Stackhouse sustained injuries to her neck and back. However, at the time of the accident and for nearly two years thereafter, she failed to qualify under any of the six exceptions of the No-Fault Act which would have permitted her to bring an action for non-economic losses. It was not until approximately May 19, 1986 that Ms. Stackhouse satisfied one of the § 35-2105 exceptions when her medical expenses exceeded $5,000 for the first time. On June 30, 1987, more than three years after the accident but within three years of qualifying under the exception permitting her to maintain and action, Ms. Stackhouse filed a complaint.

Ebbitt Green Electronics, Inc. moved to dismiss the action asserting that the three-year statute of limitations applicable to such actions had expired. See D.C. Code § 12-301(8) (1981). Ms. Stackhouse responded by asserting that she was not entitled to maintain the action before May 19, 1986 when her medical expenses first exceeded $5,000, and therefore the limitations period was appropriately calculated from that date, rather than the date of injury. The trial court rejected Ms. Stackhouse's argument and granted the motion to dismiss. We disagree and reverse the trial court's order.

D.C.Code § 12-301(8) is the applicable statute of limitations, which reads as follows:

> Except as otherwise specifically provided by law, actions for the

following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

* * * * *

(8) for which a limitation is not otherwise specially prescribed--3 years.

Emphasis added. The general rule in this jurisdiction is that the statute of limitations for personal injury actions begins to run on the date of injury. See Shehyn v. District of Columbia, 392 A.2d 1008, 1013 (D.C. 1978). In the vast majority of cases, this is true because the date of injury is also the date on which a plaintiff can first maintain an action. However, it does not follow that in every case it is the date of injury

that triggers the running of the statute of limitations.

A well-established exception to the date-of-injury standard is the discovery rule, which tolls the statute of limitations during the time in which an injury could not reasonably have been discovered. See e.g., Knight v. Furlow, 553 A.2d 1232, 1234 (D.C. (1989); Bussineau v. President and Directors of Georgetown College, 518 A.2d 423 (D.C.1986); Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192 (D.C. 1984). The discovery rule emerged to "redress situations in which the fact of injury was not readily apparent and indeed might not become apparent for several years after the incident causing injury had occurred." Ehrenhat, supra, 483 A.2d at 1201. A disability of a plaintiff, i.e minority, lack of mental capacity, or imprisonment, also tolls the statute of

limitations. D.C. Code 12-302 (1981); see, e.g., District of Columbia ex rel. W.J.D. v. E.M., 467 A.2d 457, 464 (D.C. 1983) McClam v. Barry, 225, U.S. App. D.C. 124, 129, 697 F.2d 366, 371 (1983). In either case, these exceptions to the date-of-injury standard, by tolling the statute of limitations, permit a plaintiff to maintain an action from which he otherwise would have been precluded.

Against this backdrop, we review the provisions of the 1982 No-Fault Act. The Act drastically changed the circumstances under which a person could maintain an action for personal injury resulting from and automobile accident. See Monroe v. Foreman, 540 A.2d 736, 738 (D.C. 1988) Johnson v. Collins, 516 A.2d 196, 198 (D.C. 1986) Diamond v. District of Columbia 253 U.S. App. D.C. 111, 121-22, 792

F.2d 179,189-90 (1986). The Act provided:

(a) Restriction.--Except as provided in subsection (b) of this section, no person may maintain a civil action based on liability against any other person, with respect to an injury as to which personal injury protection benefits are payable under this chapter.

(b) Exceptions to restriction. - The provisions of subsection (a) of this section do not apply if:

* * * * * * *

(6) A person may be liable for any noneconomic loss if medical expenses of a victim or his or her survivors exceed $5,000, inclusive of diagnostic x-ray costs.

D.C. Code § 35-2105 (1985 Supp.). Thus in an effort to preclude suit in motor vehicle cases where an injury was not

serious, the Act provided that the right to maintain an action could not accrue unless and until the injured party's medical expenses exceeded $5,000 or one of the other exceptions had been met. To find that the statute of limitations begins to run from the date of the accident, even thought the injured party has failed to qualify under one of the exceptions permitting her to maintain an action, would preclude a class of individuals from maintaining an action, contrary to the D.C. Council's clear intention providing a civil cause of action to such class. As counsel for appellant has aptly noted, "[p]ermitting a statute of limitation to run before the plaintiff has the right to file suit defies logic." Appellant's Reply Brief at 5. Therefore, the statute of limitations should be tolled until the plain-

tiff knows, or exercising reasonable diligence, should know that her medical expenses exceed the threshold amount. See Bond v. Gallen, 503 Pa. 286, 469 A.2d 556 (1983) (adopting a similar standard under Pennsylvania's No-Fault Act).

We hold the three year statute of limitations for maintaining an action under the 1982 No-Fault Act does not begin to run until the injured party qualifies under on the six exception of § 35-2105.

We therefore reverse the trial court order and remand the case to the trial court for further proceedings consistent with this opinion.

The STATE of Colorado, and the Colorado State Patrol, a Division of the Department of Highways, Petitioners,

v.

Leigh Ann YOUNG, Respondent

No. 81SC354.

Supreme Court of Colorado.

May 23, 1983.

As Modified on Denial of Rehearings July 5, 1983

Appeal was taken from order of the District Court of Boulder County, Richard W. Dana, J., granting State's motion to dismiss claimant's action for failure to comply with notice provision of Governmental Immunity Act. The Court of Appeals 642 P2d 18, Tursi, J., reversed and remanded, and certiorari was granted. The Supreme Court, Dubofsky, J., held that claimant's notice to the State was given within 90-day notice requirement.

Affirmed and remanded with directions.

Rovira, J., dissented and filed opinion in which Lohr, J., joined.

1. States 174

The 90-day notice limitation on claim that State and State Patrol negligently misfiled traffic complaint and summons, thereby causing claimant to be wrongfully arrested on outstanding warrant, began to run not on date claimant was wrongfully arrested, but on date claimant received copy of docket sheet which noted that case was dismissed because it had been filed in wrong county, at which time reasonable opportunity for discovery of basic and material facts underlying claim arose, and therefore, notice given to State within 90 days thereafter was timely. C.R.S.1973, 24-10-109(1)

2. States 174

There must be reasonable opportunity for claimant to discover basic and material facts underlying claim before she is duty-bound to give statutory notice required for claim against public entity. C,R,S,1973,24-10-109(1).

David R. Brougham, Hall & Evans, Denver, for petitioners.

Ted L. Hansen, Rollie R. Rogers, Denver, for respondent.

DUBOFSKY, Justice.

We granted certiorari to review the judgment of the Court of Appeals in Young v. State, 642 P.2d 18 (Colo. App.1981), reversing the Boulder County District Court's dismissal of a negligence claim against the State of Colorado and the Colorado State Patrol for failure to file timely notice of a claim

under section 24-10-109(1). C.R.S. 1973 (1982 Repl. Vol. 10). We affirm.

A Colorado State Patrol officer stopped Leigh Ann Young on Interstate 25 between Castle Rock and Colorado Springs on October 9, 1977, gave her a speeding ticket, and ordered her to appear in the Douglas County Court on November 29, 1977. When Young contacted the Douglas County Court on November 28, she was informed that there were no charges pending against her. She was told the same thing the following day, and consequently did not appear in court as ordered. Unknown to Young, the summons and complaint mistakenly had been filed in the El Paso County Court instead of the Douglas County Court.

On March 1, 1978, an officer of the Lafayette Police Department stopped Young for a license plate violation.

The officer discovered through a routine radio check that a warrant had been issued for Young's arrest in El Paso County. The officer arrested Young, advised her that the arrest was based on the warrant from El Paso County, and placed her in the Lafayette City Jail before transferring her to the Boulder County Jail, wher she was searched, fingerprinted, photographed, and placed in a cell. Young was confined approximately four hours befor she was released on bond.

When released, Young was advised to appear in the El Paso County Court on March 17, 1978. On March 15, Young called the clerk of the El Paso County Court to find out the exact time of her appearance. The clerk of the court read Young the original traffice summons and advised her that the summons directed

her to appear in the Douglas County Court. Later, the El Paso County Court Clerk called Young and advised her that the case was being dismissed and that she need not appear,

On March 17, 1978, Young received a copy of the docket sheet from the El Paso County Court which noted the case was dismissed because it had been filed in the wrong county. On June 13, 1978, Young notified the defendants of her intent to file a claim against them. Young's subsequent complaint charged that the State of Colorado and the Colorado State Patrol negligently misfiled the summons and complaint in El Paso County Court, thereby causing her to be wrongfully arrested in Lafayette on the outstanding warrant.

The defendants moved to dismiss on the grounds that Young had failed to comply

with the notice provisions of section 24-10-109, C.R.S.1973, which provided in relevant part:

"(1) Any person claiming to have suffered an injury by a public entity or by an employee thereof while in the course of such employment shall file a written notice as provided in this section within 90 days after the date of the discovery of the injury....

"(2) The notice shall contain the following:

"(b) A concise statement of the basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;..."[1] The district court granted the motion on the ground that Young incurred and discovered her injury on March 1, 1978, the date on which she was wrongfully arrested.

Young argued that she had not discovered her injury until the receipt of the El Paso County Court docket sheet on March 17, 1978, when she first learned of the incorrect filing of the summons and complaint. The district court disagreed, finding that Young's receipt of the docket sheet only informed her of the rationale behind her March 1 arrest. The district court concluded that the 90-day notice limitation began to run on March 1, and because Young did not give notice to the defendants until June 13, her complaint was barred.

The Court of Appeals reversed, holding that the 90-day period began to run on March 17, 1978, the date Young discovered the basis of her claim. The Court of Appeals noted that section 24-10-109(2)(b),C.R.S.1973, required that the notice contain a concise statement of the basis of the claim. It concluded that logically this could not be done until both

the injury and its legal basis were perceived. 642 P.2d at 20.

Thus, the Court of Appeals determined that Young had filed timely notice of her claim under section 24-10-109(1):

"The test to be used by a trier of fact, in situations where the knowledge of the injury and the knowledge of causal factors of the injury are not simultaneously perceivable, is when the injured party discovered, or in the exercise of reasonable diligence, should have discovered the injury and its basis as a claim". Id.

The "discovery of the injury" language in section 24-10-109 incorporates a notice concept commonly employed in tort litigation. See City of Aurora v. Bechtel Corp., 599 F.2d 392 (10th Cir.1979) (cause of action for professional malpractice against an architect or engineer does not accrue until

plaintiff knew or should have known all material facts essential to show the elements of that cause of action); Exnicious v. United States, 563 F.2d 418,420(10th Cir.1977)(the two year statute of limitations under the Federal Tort Claims Act does not begin to run "until a claimant has had a reasonable opportunity to discover all of the essential elements of a possible cause of action for malpractice-damages, duty breach and causation"); Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1974) (statute of limitations in a medical malpractice action runs from the date that a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the doctor's negligence).2 While the requirement of prompt notice serves important and particular purposes

in actions against governmental entities.3 the discovery rule does not hinder unduly the effectuation of those purposes. This is especially true where, as here, the notice period is extremely short. Moreover, as this court has recognized, the discovery rule furthers the interest of justice in not foreclosing access to a forum to an injured plaintiff who may not reasonably "understand or appreciate that actionable harm has been done him". Ownes v. Brochner, 474 P.2d at 606.

The defendants argue that this case should be controlled by Montgomery v. Polk County, 278 N.W.2d 911 (Iowa 1979). In Montgomery, the Iowa Supreme Court held that the discovery rule did not apply to cases under the Iowa Municipal Tort Claims Act, Iowa Code

§ 613A (1977). The argument is unpersuasive because the Iowa statutory provision differs from section 24-10-109 in two significant respects. First, Iowa Code § 613A.8 requires notice "within sixty days after the alleged wrongful death, loss or injury" -- it does not contain the "discovery of the injury" language of section 24-10-109. Second, in contrast to section 24-10-109(2)(b), the Iowa provision expressly relieves the claimant of the duty to provide the details which make out the basis of the claim. Iowa Code § 613A.8(1977). In light of these differences, the defendants' citation of Montgomery is inapposite.

This court found application of the discovery rule appropriate in a slightly different factual context in Brady v. City and County of Denver, 181 Colo.

218, 508 P.2d 1254 (1973). In Brady, a driver who was sued for personal injuries he caused in a collision sought indemnification from the city for Denver General Hospital's alleged negligence in aggravating the pedestrian's condition. We held that the 90-day notice required of claimants against a city by C.R.S.1963, 139-35-1(1) did not commence at the time the secondary injury actually occurred. Rather, the notice period began to run at the time the driver received knowledge of the secondary injury which was the basis of his indemnification claim. "To provide otherwise would impose an unfair burden, if not an impossible requirement, upon an alleged tort-feasor who later seeks indemnification as here. No provisions of the law should be interpreted in a way which requires an impossible task."

508 P.2d at 1256.

(1) The logic of Owens v. Brochner and Brady applies here. Young's claim that the defendants negligently misfiled the original traffic complaint and summons could not have been brought until Young discovered the alleged negligence upon receipt of the docket sheet on March 17, 1978. The district court's dismissal of Young's complaint appears to be based upon an assumption that Young's case is grounded in the intentional tort of false arrest. Such is not thecase. As Young's amended complaint sets out, she is proceeding against the State of Colorado.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on July 10, 1992, a true and correct copy of the foregoing PETITION TO THE UNITED STATES SUPREME COURT FOR WRIT OF CERTIORARI BY PETITIONER, JAMES BURKE SANTOS was placed in the U.S. mail, postage prepaid, addressed to the following:

James Bruce, Esq.
1010 Cherry Tower
950 South Cherry Street
Denver, Co 80222

James B Santos